No. 15-1491
Vide 15-1406

Title:	Basil J. Musnuff, Petitioner v. Leroy Haeger, et al.
Docketed:	June 9, 2016
Linked with 15A1124	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(12-17718, 13-16861)
Decision Date:	February 16, 2016

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 28 2016	Application (15A1124) to extend the time to file a petition for a writ of certiorari from May 16, 2016 to June 7, 2016, submitted to Justice Kennedy.
May 4 2016	Application (15A1124) granted by Justice Kennedy extending the time to file until June 7, 2016.
Jun 7 2016	Petition for a writ of certiorari filed. (Response due July 11, 2016)
Jun 16 2016	Waiver of right of respondents Graeme Hancock & Fennemore Craig, P. C. to respond filed.
Jul 11 2016	Brief of respondents Leroy Haeger, et al. in opposition filed.
Jul 27 2016	DISTRIBUTED for Conference of September 26, 2016.
Jul 27 2016	Reply of petitioner Basil J. Musnuff filed. (Distributed)
Sep 29 2016	Petition GRANTED limited to Question 1 presented by the petition. The petition for a writ of certiorari in No. 15-1406 is granted limited to Question 1 presented by the petition. The cases are consolidated and a total of one hour is allotted for oral argument.
Oct 17 2016	Stipulation to dismiss the petition for a writ of certiorari pursuant to Rule 46 received.
Oct 25 2016	Petition Dismissed - Rule 46.

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RECORD AND BRIEFS

No. 15-1491

Supreme Court, U.S.
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In The
Supreme Court of the United States

BASIL J. MUSNUFF,

Petitioner,

v.

LEROY HAEGER, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may impose sanctions against an attorney for non-disclosure of documents without either affording heightened procedural protections, as required for punitive sanctions, or finding a causal relationship between the sanctioned conduct and the amount awarded, as required for compensatory sanctions.

2. Whether a federal court may rely on its inherent authority to impose sanctions on an attorney for non-disclosure of documents, even though the court never issued an order compelling production of the documents pursuant to Rule 37 of the Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING

Petitioner Basil J. Musnuff was an Appellant before the Ninth Circuit in the matter sought to be reviewed. Other Appellants, in consolidated appeals, were The Goodyear Tire & Rubber Company, Fennemore Craig, P.C., and Graeme Hancock.

Respondents, and previously Appellees before the Ninth Circuit, are Leroy Haeger and Donna Haeger, husband and wife, and Barry and Suzanne Haeger, husband and wife.

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OPINIONS AND ORDERS BELOW

The amended opinion of the Ninth Circuit is reported at 813 F.3d 1233 (9th Cir. 2016) and set forth at App. 1-56. The original opinion of the Ninth Circuit is reported at 793 F.3d 1122 (9th Cir. 2015).

The Ninth Circuit affirmed, by a 2-1 vote, various district court orders imposing sanctions on The Goodyear Tire & Rubber Company and its counsel. The district court's "Proposed Order" is unreported and set forth at App. 195-229. Its subsequent order imposing sanctions is reported at 906 F. Supp. 2d 938 (D. Ariz. 2012) and set forth at App. 93-194.

JURISDICTION

The Ninth Circuit issued its amended opinion on February 16, 2016. On May 4, 2016, Justice Kennedy extended the time for filing a petition for certiorari to June 7, 2016.

The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the right to due process provided by the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

This case involves the validity of an unprecedented, multi-million-dollar sanction imposed on petitioner, an outside lawyer to The Goodyear Tire & Rubber Company ("Goodyear"), for failure to produce documents in a civil lawsuit. Characterizing the sanction as "compensatory," the district court declined to extend to petitioner any of the heightened procedural protections required for the imposition of punitive sanctions. *See Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994). At the same time, however, the district court refused to tailor the supposedly "compensatory" sanction to harm actually caused by petitioner's conduct. Purporting to follow this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the district court instead invented its own novel

rule, saying that "monetary sanctions under the Court's inherent power *usually* must be premised on a specific factual finding of a direct causal link between the sanctionable conduct and the alleged harm." App. 177 (emphasis in original). The district court then dispensed with the need for a "direct causal link" here, on the ground that the conduct was "truly egregious." *Id.*

A divided Ninth Circuit affirmed. Like the district court, the majority concluded that, under *Chambers*, "compensatory" sanctions need not be tailored to the harm caused by the sanctionable conduct, specifically rejecting Judge Watford's contrary dissenting view. And it dismissed the need for heightened procedural protections – again over Judge Watford's dissent – relying heavily on the fact that the sanction, though not tailored to identifiable harm, was paid to a party rather than to the court.

A. The Underlying Litigation.

Plaintiffs sued Goodyear in 2005 for product liability and negligence, alleging that a defect in a tire caused a motorhome accident. Although the litigation lasted five years, the district court awarded these historically-precedential sanctions based on Goodyear's alleged failure to respond to a single discovery request – even though Goodyear had raised objections to that request that were never addressed by plaintiffs in a motion to compel or overruled by the court.

The discovery process in this case took place over a period of several years. In September 2006, plaintiffs

served their First Request for Production (the "First Request"), seeking "[a]ll test records for the G159 tires." Goodyear objected to the request under Rule 34 of the Federal Rules of Civil Procedure on the grounds that it was overbroad and sought irrelevant information. Goodyear explained that the request encompassed many tire models other than the tire at issue, because the "G159" notation included a wide range of tire models and styles. Goodyear also explained that, until plaintiffs articulated a defect theory, Goodyear could not determine what testing documents might potentially relate to plaintiffs' claims.

Based on its objection, and absent any affirmative obligation to disclose documents not properly requested under Rule 34, Goodyear did not immediately produce any documents. In November 2006, however, it voluntarily supplemented its responses and produced Department of Transportation test data for the specific model at issue. In a December 2006 letter, plaintiffs acknowledged Goodyear's continuing objection to producing additional documents and threatened to seek judicial intervention regarding the First Request. Notwithstanding that threat, plaintiffs never sought a court order requiring Goodyear to produce "[a]ll test records," and the district court never issued any such order. *See* Fed. R. Civ. P. 37.

In January 2007, plaintiffs articulated their defect theory in an expert report, which expressed the opinion that the tire had failed as a result of a "combination of load and speed." In keeping with that theory, plaintiffs then served narrowed discovery requests. Their

Third Request for Production (the "Third Request") sought production of those tests used to determine the suitability of the tire at issue at highway speeds.[1] Goodyear never waived or withdrew its objections to the First Request, and plaintiffs never moved to compel any additional response to the First Request. As the district court acknowledged in a May 2007 hearing, "the issue has been narrowed . . . to the tests that have been used or were engaged in by Goodyear for the purpose of establishing . . . that they could hold for traveling above 75 or at 75 miles an hour."

Goodyear responded to the Third Request in June 2007. At that time, Goodyear produced all tests that it had used to determine the tire's suitability at highway speeds (i.e., fully responded to the agreed-upon, narrowed request). Goodyear did not produce tests that were not deemed responsive to the narrowed requests. Among those tests not produced was a proprietary "heat rise" test, which Goodyear had produced in other cases when ordered to produce all test data.

B. The District Court's Imposition of Sanctions.

In April 2010, as trial was set to begin, the parties reached a settlement. One year later, however, plaintiffs filed a motion for sanctions against Goodyear, though not against its attorneys. Despite the fact that the motion was directed only to Goodyear, the district

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[1] Plaintiffs' Second Request for Production sought unrelated materials.

court, without any notice to the attorneys, subsequently issued a proposed order concluding that both Goodyear *and its counsel* should be sanctioned. App. 229.

Acknowledging that it could not award punitive monetary sanctions without invoking procedures applicable to criminal cases – for example, the appointment of a prosecutor, proof beyond a reasonable doubt, and a jury trial – the district court determined that it could only impose sanctions that were "compensatory." App. 178. In so doing, the district court recognized Ninth Circuit precedent holding that compensatory sanctions under a court's inherent power "must be limited to the amount necessary to compensate the opposing party for the harm caused by the misconduct." App. 176 (citing *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011)). The district court concluded that, under this principle, it would be improper to award all fees and costs to plaintiffs without an explicit finding that a Defendant's conduct caused plaintiffs to incur all of those fees and costs. App. 176.

The district court decided, however, that the Ninth Circuit precedent was "in direct conflict with Supreme Court authority," specifically the decision in *Chambers*. *Id.* Faced with this inconsistency, the district court relied on its reading of *Chambers* to fashion its own idiosyncratic set of rules with respect to civil and punitive sanctions. According to the district court, "monetary sanctions under the Court's inherent power *usually* must be premised on a specific factual finding of a direct causal link between the sanctionable conduct and

the alleged harm." App. 177 (emphasis in original). But, "when the sanctionable conduct rises to a truly egregious level," there is an exception: in that case, "all of the attorneys' fees incurred in the case [may] be awarded" without the otherwise necessary direct causal link. *Id.* ("In less egregious cases, a court must tailor its award more carefully."). Accordingly, if a district court concludes at the outset that the case involves "truly egregious" conduct, the court need not provide the due process that would otherwise be required to impose a sanction lacking "a direct causal link between the sanctionable conduct and the alleged harm." *Id.*

Following this approach, and without providing Goodyear and its lawyers any heightened due process, the district court ultimately awarded plaintiffs all of their fees and costs incurred after Goodyear served its supplemental responses to plaintiffs' First Request. App. 191. The court identified the date of those responses as the point at which the improper discovery conduct began, even though that date was months before any party contends that Mr. Musnuff learned of the existence of the heat rise test.

The district court made no effort to determine what would have happened in the litigation if Goodyear had produced the heat rise test in response to the First Request. Indeed, the court conceded that it could not reasonably do so, observing that "it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred."

App. 170. Nor did the district court attempt to determine what portion of the fees and costs incurred, if any, actually were caused by petitioner's alleged misconduct or otherwise attempt a proper allocation of the sanction. Crafting its own, new standard, the district court ordered that petitioner and Goodyear pay 80 percent of the fees and costs that plaintiffs incurred after Goodyear served its supplemental responses to plaintiffs' First Request and that Goodyear's local counsel pay the remaining 20 percent. App. 191.

Following briefing by the parties regarding the calculation of fees and costs, the district court again addressed the constraints on its ability to impose sanctions without a finding of causation, stating that "[t]he only argument worthy of additional discussion involves the alleged absence of a direct causal relationship between the misconduct and the fees and costs awarded by the Court." App. 84. The court then adhered to its prior view, reiterating that no direct causal relationship was necessary to warrant the imposition of compensatory sanctions. App. 84-85. The court, however, calculated an alternative, significantly reduced figure, which it described as "a contingent award in the event a direct linkage between the misconduct and harm is required." App. 65. The reduced figure subtracted over $700,000 from the total fees and costs "for harm not directly linked to the misconduct," but the court did not explain how it determined what specific harm was caused by Goodyear and its counsel, let alone by petitioner specifically, and the court did not apply the reduction to the final sanction. App. 71.

C. The Ninth Circuit's Decision.

A divided panel of the Ninth Circuit affirmed. The majority held that the district court, despite imposing a purportedly "compensatory" sanction, was not required to find a causal link between a sanctioned party's conduct and the amount of the sanction. App. 35-36.

To uphold and justify the "compensatory" sanction despite the missing causal link, the court of appeals relied largely on its reading of this Court's opinion in *Chambers*. According to the Ninth Circuit, *Chambers* authorizes federal courts to impose sanctions without proof of resulting harm based upon "the frequency and severity of . . . abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." *Id.* (quoting *Chambers*, 501 U.S. at 57). The Ninth Circuit also held that this Court's post-*Chambers* opinion in *Bagwell* did not constrain the district court's ability to impose sanctions without a causal connection. Although the majority acknowledged that *Bagwell* required additional protections if the trial court does not "calibrate the fines to damages caused," it nonetheless upheld the district court's award despite the lack of such protections in this case. App. 38 (quoting *Bagwell*, 512 U.S. at 834).

Judge Watford dissented. Stressing the critical distinction between compensatory and punitive sanctions, he explained that "the $2.7 million sanctions award cannot be deemed compensatory" absent "a causal connection between the misconduct the court

found and the amount it awarded." App. 49. Judge Watford further stated that the majority had misread *Chambers* in establishing a new principle and allowing an award of sanctions without either heightened procedural protections or a causal link. App. 52-54.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case represents a broad, and wholly unwarranted, expansion of judicial power to punish litigants and their attorneys without full procedural protections. Because litigants and attorneys facing punitive sanctions must be granted more extensive procedural safeguards than those facing "compensatory" sanctions, *see Bagwell*, 512 U.S. at 831, it is essential that federal courts maintain a clearly identifiable line separating the two kinds of sanctions. While this Court has not defined that line with precision, its cases strongly suggest that a sanction is not "compensatory" – and thus exempt from the procedural protections necessary for the imposition of punitive sanctions – unless it "compensate[s] the complainant for losses sustained" as a result of the sanctioned conduct. *Bagwell*, 512 U.S. at 829 (quoting *United States v. Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947)). That requirement not only accords with the traditional meaning of the term "compensatory," but also provides a necessary means of assuring that courts do not impose punitive sanctions under the guise of imposing "compensatory" sanctions.

The Ninth Circuit, however, ignored the vital distinction between compensatory and punitive sanctions and, as a result, dispensed with that critical safeguard. Relying on an erroneous reading of *Chambers*, the court of appeals held that, at least in cases involving pervasive misconduct, a federal court has no need to tailor "compensatory" sanctions to the harm caused by the sanctionable actions.[2] As Judge Watford pointed out in dissent, that uncoupling of sanctions and harm allowed the Ninth Circuit to affirm an unprecedented, multi-million-dollar sanction for alleged discovery abuses, even though the amount of the sanction bore no plausible relationship to any injury suffered by plaintiffs as a result of the sanctioned behavior. That far-reaching decision strips litigants and their attorneys of vitally important rights, and it merits review by this Court.

The Ninth Circuit compounded its expansion of judicial power by committing a second error as well. Electing to proceed under its inherent powers, the district court sanctioned petitioner for failing to produce documents in discovery, even though the court had never issued a Rule 37 order specifying the documents to be produced. Again misreading *Chambers* (albeit a different part), the Ninth Circuit approved that truncated process, saying that a district court is free to impose sanctions without following the federal rules. But

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[2] *See Chambers*, 501 U.S. at 56 (where – unlike in the present case – the district court had provided warnings that conduct was sanctionable, inherent power "did not represent an end run around the notice requirements" of rules).

the court of appeals missed an important point: while federal courts have discretion to impose sanctions under their inherent power, the existence of that authority does not mean that federal courts may ignore principles requiring fair notice to the sanctioned party. Those principles, rooted in due process, protect litigants against arbitrary penalties, and they do not vanish simply because a federal court chooses to rely on its inherent power rather than the federal rules. The Ninth Circuit failed to give effect to those fundamental principles, and that decision, likewise, warrants further review.

A. A "Compensatory" Sanction Must Bear a Reasonable Causal Relationship to the Harm Suffered As a Result of the Sanctioned Conduct.

This Court has made clear that "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *Bagwell*, 512 U.S. at 826 (quoting *Hicks v. Feiock*, 485 U.S. 624, 632 (1988)). As *Bagwell* itself reflects, that principle applies with full force to the imposition of punitive sanctions by a federal court. Thus, a litigant – or, as here, an attorney – faced with punitive sanctions is entitled, at a minimum, to the same protections afforded to any defendant confronted with criminal charges.[3] Other circuits consistently recognize this principle. *See, e.g.*,

[3] As Judge Watford discussed, such protections include the appointment of an independent prosecutor, the right to a jury

Eastcott v. Hasselblad USA, Inc., 564 F. App'x 590, 598 (Fed. Cir. 2014) ("[T]he district court must also reconsider any sanctions which are punitive rather than merely compensatory in nature. When imposing punitive sanctions, such as the portion of the sanction here made payable to the court, additional procedures are required."); *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 808-09 (8th Cir. 2005) (vacating $50,000 sanction against lawyer and remanding, emphasizing that permissible compensatory sanctions should be limited to the amount needed to deter future misconduct, and not exceed the amount of injury caused by the misconduct); *Bradley v. Am. Household Inc.*, 378 F.3d 373, 378-79 (4th Cir. 2004) (explaining that while civil contempt sanctions ensure compliance with an order or compensate for losses sustained, criminal contempt sanctions vindicate the authority of court and deter future misconduct and "that a Rule 37 fine is effectively a criminal contempt sanction, requiring notice and the opportunity to be heard" (citation omitted)); *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136, 142 (2d Cir. 2000) ("[T]he District Court erred in imposing the 'punitive' sanction on Cohen without employing th procedures appropriate to a criminal trial. The gravamen of our analysis in *Mackler II* – and of the Supreme Court's analysis in *Bagwell*, on which we relied heavily – was whether or not the sanction at issue was criminal or civil *in character*.").

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trial, and proof of misconduct beyond a reasonable doubt, none of which petitioner received. App. 48.

As *Bagwell* explains, civil sanctions have been treated differently. "Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required."[4] *Bagwell*, 512 U.S. at 831. But the lesser protections afforded to civil defendants make it critical that "civil" sanctions in fact be civil, rather than punitive sanctions in civil clothing. As this Court has observed, "[t]o the extent that . . . contempts take on a punitive character . . . and are not justified by other considerations central to the contempt power, criminal procedural protections may be in order." *Id.* And, in determining whether a sanction is civil or criminal, "the stated purposes of a contempt sanction alone cannot be determinative." *Id.* at 828. Rather, reviewing courts must examine "the 'character and purpose' of the sanction involved." *Id.* at 827 (quoting *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441 (1911)).

Against this background, this Court has identified two discrete forms that a civil sanction may take. A sanction is "considered civil and remedial if it either 'coerce[s] the defendant into compliance with the court's order, [or] . . . compensate[s] the complainant for losses sustained.'" *Id.* at 829 (quoting *Mine Workers*, 330 U.S. at 303-04). Here, the sanction imposed on petitioner plainly was not "coercive" – the court had not

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[4] A discovery sanction constitutes such a contempt. *See Bagwell*, 512 U.S. at 833 ("Contempts such as failure to comply with document discovery, for example, while occurring outside the court's presence, impede the court's ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power.").

ordered him or his client to do anything – and so its character as a "civil" sanction depends entirely on whether it was "compensatory," that is, whether it "compensate[d] the complainant for losses sustained." *Id.* at 829 (citation omitted). If the sanction did not remedy harm caused by the offending conduct, then it was a punitive sanction and could not be imposed without first affording the petitioner heightened procedural protections.

The courts below, however, simply did away with the necessary link between wrongful conduct and resulting harm. Although both the district court and the Ninth Circuit labeled the sanction in this case as "compensatory," that characterization seriously distorted the plain meaning of that term. As numerous authorities show, to be "compensatory," a remedy must bear a particularized connection to harm suffered by the complaining party as a result of the offending conduct. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.'" (citing *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001))); *see also* Black's Law Dictionary (10th ed. 2014) (defining "compensatory damages" as "[d]amages sufficient in amount to indemnify the injured person for the loss suffered"). A remedy untethered to the actual harm caused by the allegedly offending conduct simply does not fall within any recognized definition of "compensatory."

In rejecting this basic understanding, the Ninth Circuit relied in large part on this Court's decision in *Chambers*. According to the court of appeals, that decision gives federal courts free rein to treat a sanction as "compensatory" (and avoid the heightened due process otherwise required) without having to find "causation" between the amount of the sanction and the alleged harm. App. 34 ("The Supreme Court dismissed Chambers's argument, which was virtually identical to the causation requirement claim the [petitioners] are making in this case. . . .").[5] In the Ninth Circuit's view, even if a causal link is necessary in most cases, a court may still impose sanctions without the applicable due process requirements so long as a court finds "bad faith" and "frequent and severe abuses of the judicial system." App. 36. Put another way, if a court makes these findings – findings made *before* granting the accused party any heightened due-process protections – it may then impose a sanction unrelated to the harm

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[5] Although the district court speculated that the lawsuit would have settled immediately if certain documents had been disclosed earlier, it ultimately confessed that it found it "impossible to point to precise causal links between all the sanctionable behavior and the expenses incurred by Plaintiffs," i.e., the sanction did not compensate for the alleged violation. App. 191. Judge Watford's dissent in the Ninth Circuit also correctly noted that the record is "devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded," and that "[t]he majority does not contend that a causal connection between Goodyear's misconduct and the fees awarded has been shown here, as required for the sanctions to be deemed compensatory." App. 50, 52.

caused by the misconduct without the safeguards required for punitive sanctions.[6]

There are several serious flaws in this analysis. To start with, it makes little sense to think that the procedural rights of those subject to sanctions come and go depending upon whether they have engaged in bad-faith conduct or "frequent and severe abuses of the judicial system." On the contrary, it puts the cart before the horse for a court to hold hearings without full procedural safeguards and then decide, based on the results of that hearing, what protections the defendant should have been entitled to receive. Furthermore, if a court believes at the outset that a litigant may have engaged in seriously improper behavior, it would seem all the more important for the accused litigant to receive the full panoply of constitutional protections in order to defend himself.[7] Those kinds of judge-litigant confrontations are situations in which the potential for abuse of judicial power is likely to be at its apex.

Despite the Ninth Circuit's contrary view, the decision in *Chambers* provides little support for a no-causal-link rule. Although the Court in *Chambers* did deal with the federal courts' authority to impose sanctions, it did not have to resolve whether the particular

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[6] By misreading *Chambers*, the Ninth Circuit also effectively set aside its own precedent requiring a causal link to impose "compensatory" sanctions. *See* App. 52.

[7] For example, in this case, petitioner did not even know that he was subject to sanctions of any kind until *after* the district court entered a proposed order finding the conduct of all counsel, in addition to that of Goodyear, sanctionable.

sanction before it was punitive or compensatory. As Judge Watford explained below, the defendants in *Chambers* "did not raise any due process arguments, and the Supreme Court therefore did not address whether the process afforded the defendants was adequate." App. 55. Consequently, the Court had no reason to consider, let alone decide, whether a non-coercive compensatory sanction must bear a reasonable causal relation to the harm caused by the sanctionable conduct.

Indeed, to the extent that *Chambers* bears on that question at all, it seems to cut *against* the Ninth Circuit's view. In *Chambers*, the Court specifically observed that the sanction in question "serv[ed] the dual purpose of 'vindicat[ing] judicial authority . . . and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.'" 501 U.S. at 46 (citation omitted). The latter purpose – "mak[ing] the prevailing party whole *for expenses caused by his opponent's obstinacy*," *id.* (emphasis added) – is a textbook definition of "compensatory" relief. And, as the Court recognized, properly tailored "compensatory" relief can still serve the purpose of "vindicating judicial authority" without the need for the court to resort to punitive sanctions. *Id.* at 55 (citation omitted).

The Ninth Circuit's reading of *Chambers*, at bottom, seems to rest on a belief that the sanctions at issue were not, in fact, tailored to harm suffered by the complaining party. Even if that were correct, it would be irrelevant because, as we have said, no one in

Chambers argued that the sanctions were actually punitive sanctions that required enhanced procedural protections. Moreover, there is good reason to doubt the accuracy of that view. As Judge Watford explained in his dissent, *Chambers* can reasonably be read to support the conclusion that all sanctions awarded were incurred as a direct result of the sanctionable conduct, and thus properly "compensatory." App. 53-54. In particular, and unlike here, "Chambers never had a good-faith basis for resisting the relief [the plaintiff] sought," and everything done to "defend" the suit was "aimed solely at obstructing and delaying the inevitable" outcome. *Id.* Under those circumstances, and unlike in the instant case, "it seems fair to say that all of [the plaintiff's] attorney's fees were incurred as a direct result of [the sanctioned party's] misconduct." App. 54.

Finally, in treating the sanction here as "compensatory," the Ninth Circuit emphasized that "[n]ot one dime was awarded to the government or the court." App. 43. But payment to a party is a necessary condition for a civil sanction, not alone a sufficient one. If payment to a party were the sole criterion, courts would be able to impose criminal fines on litigants – without the necessary procedural safeguards – merely by putting the funds in a party's pocket, regardless of whether the party actually suffered commensurate harm. Apart from its basic unfairness to the sanctioned party, that kind of maneuver would be flatly inconsistent with the sole reason for awarding sanctions to

a party in the first place: to compensate the party for injury caused by the sanctioned conduct.

The need to show a causal connection between sanctioned conduct and harm to an opposing party is thus a mandatory element of "compensatory" sanctions, not a discretionary one. Here, that connection is simply missing. The district court freely conceded that it was not basing, and could not base, its award on harm suffered by plaintiffs as a result of any failure to produce documents, and the Ninth Circuit found that it had no obligation to do so. The upshot was that petitioner was denied the heightened protections assured to criminal defendants, even though he was subjected to a sanction that has all the hallmarks of a criminal punishment.

This treatment would be intolerable in any case. But the unfairness is magnified when, as here, a court imposes a discovery sanction *after* a case has ended and there has been no specific prior court order that the defendant is charged with violating. As the Court noted in *Bagwell*, "[c]ontempts such as a failure to comply with document discovery" are generally not considered criminal because they implicate a "court's ability to adjudicate the proceedings before it and thus touch upon the core justification for the contempt power." 512 U.S. at 833. However, when a court invokes its inherent power to fashion an after-the-fact remedy for an alleged rule violation and believes (correctly or incorrectly) that it has been misled, there is the same risk of abuse that occurs in the contempt context. As *Bagwell* noted, if a court goes beyond imposing either

a coercive or purely compensatory sanction, "an even more compelling argument can be made" for requiring additional due-process protection. *See id.* at 831.

In sum, by abandoning the critical element of causation, the courts below have imposed a punitive sanction under the guise of a civil sanction. If upheld, the Ninth Circuit opinion would expand the power of district courts and permit what amounts to the imposition of punitive sanctions without the requisite procedural safeguards. The requirement of direct causation is necessary to keep a proper dividing line between civil and punitive sanctions, and this Court should grant review to restore it.

B. The Ninth Circuit's Decision Allows Federal Courts to Circumvent Important Protections Provided by the Discovery Rules.

The Ninth Circuit further expanded the federal courts' authority to impose sanctions by allowing them to circumvent the framework and due-process protections provided by the Federal Rules of Civil Procedure. The rules establish well-recognized procedures for the production of documents and for the resolution of disputes over the adequacy of such production. Far from mere formalities, those procedures ensure that any party potentially subject to sanctions has received sufficient notice through a court order and been given a final opportunity to cure any deficient discovery. The Ninth Circuit, however, held that federal courts are free to disregard such procedures so long as they

choose to invoke their "inherent power" instead of imposing sanctions under the rules themselves.

That decision severely distorts the considered balance established by the federal rules and ignores the practice observed by courts and relied on by lawyers since the rules were adopted. Those rules specify that, if a litigant objects to a discovery request, the requesting party may seek a court order compelling production. *See* Fed. R. Civ. P. 37(a)(1), (3). That court order, in turn, provides the basis – the only basis – for possible sanctions. Under the rules, noncompliance *with the court order*, rather than any initial failure to produce, gives the court authority to impose sanctions on the noncomplying party. *See* Fed. R. Civ. P. 37(b).

This multi-step process is necessary to ensure that parties have fair notice of what they are obliged to produce. As multiple circuits have explained, the procedures set forth in Rule 37 reflect elemental principles of due process, giving the non-producing party advance notice of the risks of noncompliance as well as a final opportunity to carry out its obligations. Thus, the Federal Circuit has stated that "[a]bsent [a motion to compel under Rule 37], the defendants cannot complain of alleged discovery violations." *Pandrol USA, LP v. Airboss Ry. Prods., Inc.*, 320 F.3d 1354, 1369 (Fed. Cir. 2003). Likewise, the Fifth Circuit has made clear that "[s]anctions such as estoppel may be imposed under Rule 37(b) for failure to produce documents *only when the court has entered an order compelling discovery*." *Broad. Music, Inc. v. Xanthas, Inc.*, 855 F.2d 233, 238 (5th Cir. 1988) (emphasis added); *see also Clinchfield*

R.R. Co. v. Lynch, 700 F.2d 126, 132 (4th Cir. 1983) ("[T]he fact is inescapable that [the requesting party] merely accepted that answer and made no efforts to compel a response or otherwise to supply a crucial deficiency in its proof.").

The justifications for providing notice and a fair opportunity to address possible discovery violations apply no less strongly where a court is exercising its inherent authority. Whatever the limits of that authority may be, it must be exercised with a proper regard for the rights of litigants subject to it. The Ninth Circuit held otherwise, however, once again concluding that the decision in *Chambers* – this time, a different part of *Chambers* – allowed the federal courts to exercise their inherent power without regard for the federal rules. Again, its reading of *Chambers* was incorrect.

No one disputes that the Court in *Chambers* allowed federal courts to impose sanctions under their inherent power even though they might be able to impose similar sanctions under the federal rules. But, contrary to the Ninth Circuit's apparent view, that authority does not mean that the federal rules can just be ignored. Thus, the Court in *Chambers* was careful to say that, "when there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power." *Chambers*, 501 U.S. at 50. And the Court further noted that "[a] court

must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process. . . ." *Id.*

These admonitions – issued in a case where the offending conduct unquestionably could have been sanctioned under the federal rules – apply with even greater force where the conduct could *not* be sanctioned under those rules. *See id.* Indeed, the First Circuit has stated unequivocally that "[w]hen . . . the Civil Rules limit the nature of the sanction that can be imposed, *a court may not use its inherent powers to circumvent the Rules' specific provisions.*" *United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993) (emphasis added).

In this case, it is unquestioned (1) that Goodyear timely objected to plaintiffs' First Request, (2) that plaintiffs never moved to compel production of "[a]ll test records," and, most importantly, (3) that the district court never issued an order compelling such production. Yet, years later, the court decided to impose a $2 million sanction for petitioner's ostensible failure to comply with the very request to which Goodyear objected. By affirming that punitive sanction, the Ninth Circuit disregarded a longstanding, essential, and well-established component of the discovery protocol, and, in so doing, ignored the due-process protections underlying the rules. The result was an unprecedented sanction against petitioner for following procedures specifically authorized under the rules and practiced every day by countless lawyers in federal actions. A federal court's inherent power simply does not stretch

that far, and this Court should grant review to make that clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation,

Defendant-Appellant,

and

SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, Inc., an Indiana corporation,

Defendants,

v.

ROETZEL & ANDRESS, LPA; BASIL J. MUSNUFF,

Movants.

No. 12-17718

D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife, *Plaintiffs-Appellees*, v. THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation, *Defendant-Appellant*.	No. 13-16801 D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife, *Plaintiffs-Appellees*, v. THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation; SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation, *Defendants*, v. BASIL J. MUSNUFF, *Movant-Appellant*.	No. 13-16861 D.C. No. 2:05-cv-02046-ROS

LEROY HAEGER; DONNA HAEGER, husband and wife; BARRY HAEGER; SUZANNE HAEGER, husband and wife,

Plaintiffs-Appellees,

v.

THE GOODYEAR TIRE & RUBBER COMPANY, an Ohio corporation; SPARTAN MOTORS, INC., a Michigan corporation; GULFSTREAM COACH, INC., an Indiana corporation,

Defendants,

v.

FENNEMORE CRAIG, P.C.; GRAEME HANCOCK,

Movants-Appellants.

No. 13-16862

D.C. No. 2:05-cv-02046-ROS

ORDER AND AMENDED OPINION

Appeal from the United States District Court for the District of Arizona
Roslyn O. Silver, Senior District Judge, Presiding

Argued and Submitted
March 10, 2015 – San Francisco, California

Filed July 20, 2015
Amended February 16, 2016

Before: J. Clifford Wallace, Milan D. Smith, Jr., and Paul J. Watford, Circuit Judges.

Order;
Opinion by Judge Milan D. Smith, Jr.;
Dissent by Judge Watford

SUMMARY*

Sanctions

The panel affirmed the district court's order imposing monetary sanctions against attorneys Basil Musnuff and Graeme Hancock and The Goodyear Tire & Rubber Company, and non-monetary sanctions against Goodyear.

The panel held that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case, and to determine that Fed. R. Civ. P. 37 did not provide the appropriate remedy, especially since the discovery fraud was not discovered until after the cases had settled.

The panel held that it was not abuse of discretion to find that the Sanctionees each acted in bad faith. The panel also held that the district court acted well within its discretion in awarding all the attorneys' fees and costs incurred by the Plaintiffs after Goodyear served its supplemental responses to Plaintiffs' First Request.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court did not abuse its discretion in imposing non-monetary sanctions on Goodyear. The panel held that the district court's imposition of non-monetary sanctions against Goodyear was balanced, narrowly tailored, and imposed no sanctions beyond what was necessary to remedy what the district court perceived as an ongoing problem in Goodyear's litigation.

Judge Watford dissented. He agreed with the majority that the district court's misconduct findings were supported by the record, but he would nonetheless conclude that the $2.7 million sanctions award must be vacated because Goodyear and its lawyers were not afforded heightened procedural protections before punitive sanctions were imposed.

COUNSEL

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John J. Egbert (argued), Jennings Strouss & Salmon, PLC, Phoenix, Arizona; David L. Kurtz, The Kurtz Law Firm, Scottsdale, Arizona, for Plaintiffs-Appellees.

ORDER

The opinion and dissent filed on July 20, 2015 and published at 793 F.3d 1122 are hereby amended. The amended opinion and dissent are filed concurrently with this order.

With these amendments, Judge M. Smith voted to deny the petitions for rehearing en banc, and Judge Wallace so recommends. Judge Watford voted to grant the petitions.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing en banc are **DENIED**.

Future petitions for panel rehearing and petitions for rehearing en banc will not be entertained.

OPINION

On November 8, 2012, after a six-hour evidentiary hearing, and after considering the record in the case and fifteen briefs filed by the potentially-sanctionable parties, then-Chief United States District Judge

Roslyn O. Silver, of the United States District Court for the District of Arizona, handed down a sixty-six-page order (Order) imposing sanctions ultimately calculated in the sum of $548,240 against attorney Graeme Hancock (Hancock), and $2,192,961 jointly against attorney Basil J. Musnuff (Musnuff) and The Goodyear Tire & Rubber Company (Goodyear) (collectively the Sanctionees). In the Order, which included forty-nine pages of findings of fact and seventeen pages of legal analysis, Judge Silver found that "there is clear and convincing evidence that sanctions are required to be imposed against [] Hancock, [] Musnuff, and Goodyear. The Court is aware of the unfortunate professional consequences that may flow from this Order. Those consequences, however, are a direct result of repeated, deliberate decisions by [] Hancock, [] Musnuff, and Goodyear to delay the production of relevant information, make misleading and false in-court statements, and conceal relevant documents. [] Hancock, [] Musnuff, and Goodyear will surely be disappointed, but they cannot be surprised."[1]

Because the fraud and deceit practiced on the district court and the Plaintiffs by the Sanctionees was

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[1] The district court began its order with the following powerful declaration, which warrants the attention of all members of the bar: "Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests.[] The little voice in every attorney's conscience that murmurs *turn over all material information* was ignored."

not discovered until after the underlying litigation had been closed and Plaintiffs had settled with Goodyear based upon the incomplete information provided by the Sanctionees, the district court imposed the sanctions in reliance upon its inherent power, and not under Federal Rule of Civil Procedure 11, or 28 U.S.C. § 1927.

The Sanctionees appeal from the judgment awarding the sanctions, arguing that the district court abused its discretion in relying upon its inherent power to impose sanctions, and in determining the amount and the nature of the sanctions imposed.

We affirm both the district court's monetary and non-monetary sanctions imposed against the Sanctionees.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2003, Leroy and Donna Haeger, and Barry and Suzanne Haeger (collectively the Haegers, or Plaintiffs) were all seriously injured when one of the Goodyear G159 tires on the front of their motor home failed while they were driving on a highway, which caused their vehicle to swerve off the road and overturn. The Haegers retained attorney David Kurtz (Kurtz), who filed suit against Goodyear in 2005 in Arizona state court. The case was quickly removed to federal court by Goodyear. Goodyear was represented by Musnuff, who served as Goodyear's "national coordinating counsel" on all G159 cases, and Hancock, who served as Goodyear's local counsel in Arizona.

Musnuff and Goodyear's in-house counsel, Deborah Okey (Okey), were responsible for reviewing and approving all discovery responses in the case.

Before releasing its G159 tire, Goodyear performed FMVSS119 Department of Transportation (DOT) tests, electronic post-production W84 high speed test data (High Speed tests), L04 heat rise test results (Heat Rise tests), DOT endurance tests, crown durability tests, and bead durability tests on the tire. Throughout discovery, the Haegers repeatedly sought the results of Goodyear's tests on the G159 tire. However, as detailed below, Goodyear, Musnuff, and Hancock failed to search for, and/or withheld these relevant and responsive G159 testing documents in violation of their discovery obligations to produce requested relevant documents, and to supplement prior disclosures. *See* Fed. R. Civ. Pro. 26, 34.

Goodyear served its Initial Disclosure Statement on the Plaintiffs on December 15, 2005, pursuant to Rule 26. The initial disclosures did not include testing information, and Kurtz promptly requested that Goodyear produce "[t]esting documentation regarding the G159 tires." Nevertheless, Goodyear did not supplement the disclosures in its Initial Disclosure Statement. Goodyear propounded interrogatories asking for, among other things, "each legal theory under which you believe Goodyear is liable." In response, on August 18, 2006, the Haegers articulated their theory of the case: "Prolonged heat causes degradation of the tire which, under appropriate circumstances, can lead to tire failure and tread separation even when the tire is

properly inflated." Additionally, the Haegers stated that when the G159 tire was used on motor homes, the tire produced a level of heat and degradation "which the tire was not designed to endure, leading to its premature failure."

The Haegers served their First Request for Production of Documents (First Request), pursuant to Rule 34, in September 2006. "Request for Production Number 14" requested "[a]ll test records for the G159 tires, including, but no[t] limited to, road tests, wheel tests, high speed testing, and durability testing." Goodyear objected to this request with a series of boilerplate objections, and failed to produce any documents. However, on November 1, 2006, in its supplemental response to "Request for Production Number 14," Goodyear agreed to produce the FMVSS119 DOT tests for the G159 tire. On December 20, 2006, Kurtz sent Hancock a letter clarifying what had been requested:

> *Request for Production No. 14.* We asked for test records for the G159 275/70R 22.5, including road tests, wheel tests, high speed testing, and durability testing. You objected, suggesting the test records were overly broad and unduly burdensome. You have only produced the DOT test data showing the tires were tested at 30 mph. My interest is in finding the rest of the test data. If there is any, it is your obligation to disclose it.

On January 2, 2007, Hancock wrote an email to Musnuff regarding "Request for Production Number 14," stating:

> We should either respond to any portions of Kurtz' 12.20 letter or figure out that we have a fight on our hands on these points and prepare a counter argument . . . RTP 14. [. . .] [t]est records for all testing on this size G159 tire. Again, was the only testing at 30 mph or less? What speed testing/fleet testing did Goodyear rely on? Can/should we supplement since his theory is that this tire can't operate at 75 mph in the southwest for long periods?

On January 5, 2007, the Haegers's expert witness, David Osborne (Osborne), identified speed as a contributing factor in the G159 tire's failure in his expert report. In response to Osborne's report, Musnuff wrote to Hancock:

> Osborne appears to draw the conclusion that the subject tire was only tested at speeds up to 30 mph from the fact that the only test data we produced is the DOT test data. Of course, our discovery response was limited to DOT test data because plaintiff had not yet identified their defect theory at that time. Now that plaintiffs are pinpointing speed as an issue, perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds. Thoughts?

Musnuff also forwarded this email to Goodyear's in-house counsel, Okey, concluding "we should consider supplementing our discovery responses to show the testing of this tire at various higher speeds." Despite

Goodyear's understanding of its obligation to supplement its previous discovery responses, they were not supplemented.

Also in January 2007, one of Goodyear's tire engineers located the G159 tire's High Speed tests and Heat Rise tests. It is clear that the engineer delivered at least the High Speed tests to Musnuff because on February 12, 2007, Musnuff emailed the High Speed tests to Hancock. Neither Musnuff nor Hancock produced these tests to the Haegers. Instead, on April 6, 2007, when Judge Silver asked Hancock "is there any internal documentation that is available that has been requested that your . . . clients have not provided," Hancock responded that Goodyear had "responded to all outstanding discovery . . . if a document shows up, we'll of course produce it and supplement our answers." This response to Judge Silver was false. At the time of this statement, Hancock had been sent the High Speed tests and had stated to Musnuff that they should be produced promptly "given the accusation of no high speed testing in the January report that put that at issue in the case"; it was thus a false representation to state that Goodyear had responded to all outstanding discovery.

Additionally, as a follow up to his receipt of the High Speed tests, Musnuff emailed Goodyear's tire engineer requesting additional data, explaining "if we disclose any of the [High Speed] testing – which is in our best interest – then we need to produce all of it." Despite the fact that these High Speed testing documents were responsive to the Haegers' discovery

request, Musnuff was still undecided about whether they were going to be produced.

On May 8, 2007, the Haegers served a Third Request for Production of Documents (Third Request) requesting tests related to whether the G159 tire was suitable for use at a speed of 75 mph. At a discovery dispute hearing on May 17, 2007, Hancock admitted that there were tests available showing that the tire was tested for speeds above 30 mph, but did not mention that Goodyear had been withholding these tests from the Haegers for approximately four months. Instead, Hancock represented that Goodyear would now produce these tests because of the new obligation arising from the Haegers' Third Request. This was a misrepresentation to the court as Hancock had known that these High Speed tests were responsive to the First Request since February 2007.

On May 21, 2007, Goodyear deposed Osborne, the Haegers' expert witness. Osborne was deposed while under the impression that no high speed testing of the tire had been done. Neither Hancock nor Musnuff disclosed that Goodyear was withholding the High Speed tests. The district court found that taking Osborne's deposition "knowing that Mr. Osborne was operating under incorrect assumptions and an incomplete record," could only have been done "to delay production of the tests in hopes of gaining a tactical advantage."

Goodyear finally produced the High Speed tests on June 21, 2007, again representing that the production

was in response to the Third Request, when these tests were actually responsive to the First Request.

On September 13, 2007, Richard Olsen (Olsen), Goodyear's Rule 30(b)(6) witness, testified during a deposition that while additional tests had been undertaken to determine if Goodyear could justify a speed rating of the G159 tire at 75 mph, none of these additional tests was available. Such tests were clearly in addition to the High Speed tests that had been turned over to the Haegers. Shortly after Olsen's deposition, on October 19, 2007, Hancock assured the court that there were no other tests in existence beyond those already produced to the Haegers. Despite the Haegers' demands for production, during pre-trial discovery, Goodyear disclosed only the FMVSS119 DOT tests and the High Speed tests.

On April 14, 2010, the first day of trial, the Haegers and Goodyear informed the court that they had reached a settlement, and the court closed the case. Based on the information derived from the results of at least one of the Other G159 Cases (discussed below), without having the relevant information in their possession due to the Sanctionees' deceit, the Haegers apparently settled for a small fraction of what they might otherwise have done.

Some time after the case had settled, Kurtz saw an article stating that Goodyear had produced internal heat and speed testing in a separate case involving the G159 tire, and he realized that Goodyear had withheld evidence it was required to produce during discovery.

Kurtz filed a motion for sanctions on May 31, 2011. The motion for sanctions argued that Goodyear had engaged in discovery fraud by "knowingly conceal[ing] crucial 'internal heat test' records related to the defective design of the G159." Goodyear's opposition to the motion argued that it "never represented that the DOT test data comprised the totality of testing with regard to the G159 tire." Goodyear further argued:

> Nor did Goodyear ever state or imply that it would produce "all test records for the G159 tires" or identify *all* tests performed on the G159 tires as sought in plaintiffs' initial discovery requests. Rather, Goodyear objected to these requests and stated precisely which test records it agreed to produce, unambiguously indicating that it would not produce *all* test data.

This argument came as a surprise to the district court and it admitted that it "was under the impression that Goodyear had produced *all* test data relevant to Plaintiffs' claims."

On October 5, 2011, finding that there were "serious questions regarding [Goodyear's] conduct in this case," the district court ordered Goodyear to produce "the test results at issue." Goodyear produced the Heat Rise tests, but did not mention any additional tests.

On February 24, 2012, the district court issued a proposed order sanctioning Goodyear based on Goodyear's failure to produce the Heat Rise tests and the

repeated representations made by Hancock to the district court that all responsive documents had been produced. The district court's proposed order concluded that the Heat Rise tests should have been produced in response to the First Request. In responding to this proposed order, Goodyear, *apparently by accident*, disclosed the existence of additional G159 tests – the crown durability, bead durability, and DOT endurance tests – none of which had been mentioned or produced in the litigation. The court also discovered that Olsen, Goodyear's Rule 30(b)(6) witness, knew about, but failed to mention, these additional tests at his deposition. The district court held that these tests should also have been produced as responsive to the Haegers' First Request.

The district court held an evidentiary hearing on March 22, 2012, at which both Musnuff and Hancock testified that they had not knowingly engaged in discovery fraud. The district court found their testimonies to be untruthful and unreliable, and held that "Mr. Hancock, Mr. Musnuff, and Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits."

In its Order, the district court reviewed Goodyear's discovery responses in certain other G159 tire failure actions (collectively the Other G159 Cases) against Goodyear in order to compare what the Sanctionees knew, and when they knew it, with regards to the G159

tests.[2] In *Woods v. Goodyear*, No. CV 04-45 (Circuit Court of Hale County, Alabama), in August 2007, a Goodyear employee informed Musnuff that in addition to the High Speed tests, the tests used to determine the suitability of the G159 to be driven at 65 mph included FMVSS119 DOT tests, Heat Rise tests, bead durability tests, crown durability tests, W16 tests, W64 tests, G09 tests, and L04 tests. In *Schalmo v. Goodyear*, No. 51-2006-CA-2064-WS (Fla. Cir. Ct., 6th Cir., Pasco County), in April 2008, Musnuff and Goodyear produced the Heat Rise tests in response to a request to produce tests associated with speed rating. Musnuff wrote an email in May 2009 stating that the *Schalmo* plaintiffs "highlighted the Heat Rise testing taken during the durability testing of the G159." This case ended in a plaintiff's verdict of $5.6 million. Finally, in *Bogaert v. Goodyear*, No. CV 2005-051486 (Sup. Ct. of Maricopa County, Arizona), in response to an order from the court to produce testing of the G159 tire's suitability at 65 mph, Musnuff emailed Hancock in June 2008 stating that the whole suitability testing package included: (1) the extended DOT tests, (2) the Heat Rise tests, (3) the bead durability tests, and (4) the crown durability tests. As in this case, in each of the Other G159 Cases, Goodyear engaged in lengthy discovery battles with the plaintiffs before it produced

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[2] The district court considered Hancock, Musnuff, and Goodyear's conduct in the Other G159 Cases for the purpose of assessing credibility, and determining the actors' state of mind. It expressly did not base its sanctions on the Sanctionees' conduct in the Other G159 Cases.

the requested documents. *Woods* and *Bogaert* were ultimately settled, but the amount of the settlements is either held under seal, or not reflected in the record of those cases. As stated above, presumably with the benefit of the Heat Rise tests, *Schalmo* yielded a $5.6 million verdict to the plaintiffs.

The district court considered each of the Sanctionees' conduct in the Other G159 Cases in light of their conduct in the present case, and concluded that "Goodyear and its counsel took positions in other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable."

The district court concluded that sanctions under 28 U.S.C. § 1927 could not reach Goodyear's conduct, and that sanctions pursuant to Rule 11 were unavailable as they should be imposed before a case is closed. Accordingly, relying upon its inherent power, the district court determined that the most appropriate sanction for "remedying a years-long course of misconduct" would be "to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request." The district court held that the supplemental responses, in which Goodyear only produced the FMVSS119 DOT tests, "was the first definitive proof that Goodyear was not going to cooperate in the litigation process." The court also noted that while it would be impossible to determine how the litigation would have proceeded if Goodyear had made the proper disclosures, the case

more likely than not would have settled much earlier, and the Haegers believe, for considerably more money.

The district court then conducted an exhaustive analysis of the documentation submitted by Plaintiffs concerning the time entries of its attorneys after Goodyear served its supplemental responses to Plaintiffs' First Request, and the extensive objections made by Goodyear and its counsel to these time entries. The district court "spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award," and with painstaking attention to detail, made adjustments based on Goodyear's objections. Ultimately, using the lodestar method, the district court found that the Haegers should be reimbursed $2,741,201.16 in attorneys' fees and costs. The district court determined that Hancock would be responsible for twenty percent of these fees and costs "[b]ased on his relatively limited involvement, but in light of his repeated misstatements and his failure to correct the record once he learned his representations were false." Musnuff and Goodyear were held jointly responsible for the remaining eighty percent of the fees and costs.

The district court also ordered Goodyear "to file a copy of this Order in any G159 case initiated after the date of this Order," with a footnote indicating that "Goodyear may apply to the court hearing the case to be excused from this requirement." The district court concluded that such filings were necessary based on Goodyear's history of engaging in discovery misconduct during every G159 case that had been brought to

the court's attention. The court reasoned that by filing the Order in future G159 cases, Goodyear would "alert plaintiffs and the courts" that it has not acted "in good faith in the past when litigating such cases," and give notice of the tests Goodyear had "attempted to conceal in previous cases."

STANDARD OF REVIEW AND JURISDICTION

"The district court's award of sanctions and the amount of the award are reviewed for abuse of discretion." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1108 (9th Cir. 2002) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991)). Since imposing a sanction under its inherent authority "is within the sound discretion of the district court, we will not overturn its decision unless the court committed an error of law or the court's factual determinations were clearly erroneous." *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109 (9th Cir. 2005).

We need not resolve whether a bad faith finding must be supported by clear and convincing evidence, or whether a lesser quantum of evidence suffices, because the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case. *See Lahiri v. Universal Music and Video Distrib. Corp.*, 606 F.3d 1216, 1219 (9th Cir. 2010).

We have jurisdiction over the Sanctionees' appeals pursuant to 28 U.S.C. § 1291.

DISCUSSION

I. The District Court's Inherent Power

"It has long been understood that [c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution, power which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal citations and quotation marks omitted). The Supreme Court has specifically recognized that the "inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Prods. Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946) (citing *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944)).

This inherent power is not limited by overlapping statutes or rules. The Supreme Court explained "that the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." *Chambers*, 501 U.S. at 49. Thus, the Sanctionees' argument that the district court should have relied on Federal Rule of Civil Produce [sic] 37 fails.[3] While Rule

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[3] Rule 37 provides that "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." If the party fails to comply with a court order, Rule 37 provides the following remedies: Rule 37(b)(2)(A) "If a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include the following:

37 also provides a method to sanction a party for failing to comply with discovery rules, it is not the exclusive means for addressing the adequacy of a discovery response. *See id.*

The Sanctionees also argue that the court cannot impose sanctions in this case because the Haegers failed to move to compel disclosure or discovery under Rule 37, and thus the Sanctionees never violated a district court order compelling disclosure or discovery. More specifically, the Sanctionees contend that absent

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(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination"; Rule 37(b)(2)(C) "Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust."

Additionally, if a party fails to disclose or supplement an earlier response, Rule 37(c)(1) states: "If a party fails to provide information . . . the party is not allowed to use that information . . . to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure; (B) may inform the jury of the party's failure; and (C) may impose other appropriate sanctions. . . ."

such a motion to compel or order requiring production, Goodyear and its counsel complied with discovery rules, and thus the district court does not have power to sanction the Sanctionees' conduct. The Supreme Court has expressly rejected this argument. "[N]either is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules . . . if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." *Id.* at 50. We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the conduct at issue in this case, and to determine that Rule 37 did not provide the appropriate remedy, especially since the discovery fraud was not discovered until after the case had settled.

A. Bad Faith

Before awarding sanctions pursuant to its inherent power, "the court must make an express finding that the sanctioned party's behavior 'constituted or was tantamount to bad faith.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006). We have found bad faith in a variety of conduct stemming from "a full range of litigation abuses." *Chambers*, 501 U.S. at 4. For example "[a] party 'demonstrates bad faith by delaying or disrupting the litigation. . . .' *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)." *Leon*, 464 F.3d at 961 (plaintiff demonstrated

bad faith by going to extraordinary measures to destroy evidence).

Actions constituting a fraud upon the court or actions that cause "the very temple of justice [to be] defiled" are also sufficient to support a bad faith finding. *Chambers*, 501 U.S. at 46. For example, in *Pumphrey v. K.W. Thompson Tool Company*, the decedent's family brought a wrongful death action against a gun manufacturer after the decedent dropped the manufacturer's gun with the safety devices engaged and it fired, killing the decedent. 62 F.3d 1128, 1130 (9th Cir. 1995). During trial, the manufacturer introduced tests showing that when the gun was dropped, the safeties performed as designed and the gun never fired. *Id.* After the trial concluded, Plaintiffs' attorney learned that in a subsequent, unrelated lawsuit, the manufacturer had produced tests during which the gun had fired when dropped. *Id.* These tests had not been produced during Plaintiffs' litigation even though they were available two months before trial, and despite the manufacturer's assurance that gun tests would be made available upon their discovery. *Id.* at 1131. The manufacturer also affirmatively mischaracterized the nature of these tests during later discovery, and introduced testimony during trial that it had never seen the gun fire when dropped. *Id.* at 1132. Plaintiffs moved to set aside the trial verdict, pursuant to Federal Rule of Civil Procedure 60(b). *Id.* at 1130. We upheld the district court's grant of a new trial finding that the manufacturer had "engaged in a scheme to defraud the jury, the court, and [the Plaintiffs], through the use of

misleading, inaccurate, and incomplete responses to discovery requests, the presentation of fraudulent evidence, and the failure to correct the false impressions created. . . ." *Id.* at 1132. We further held that the "end result of the scheme was to undermine the judicial process, which amounts to fraud upon the court." *Id.* (citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46, 250 (1944) (deliberately planned scheme to present fraudulent evidence constitutes fraud upon the court); *Abatti v. C.I.R.*, 859 F.2d 115, 118 (9th Cir. 1988) (fraud upon the court involves unconscionable plan or scheme to influence the court improperly)). While the procedural posture of *Pumphrey* differs from the one in this case, the similarities with this case support the conclusion that the district court did not abuse its discretion in concluding that Sanctionees engaged in fraud upon the court in their scheme to avoid their discovery obligations.

In *B.K.B. v. Maui Police Department*, we found "counsel's reckless *and* knowing conduct" to be "tantamount to bad faith and therefore sanctionable under the court's inherent power." 276 F.3d 1091, 1108 (9th Cir. 2002) (emphasis in original). *B.K.B.* was a sexual harassment suit, in which defense counsel introduced testimony in violation of Federal Rule of Evidence 412.[4] Defense counsel introduced this testimony after

[4] Rule 412: "(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct: (1) evidence offered to prove that a victim engaged in other sexual behavior; or (2) evidence offered to prove a victim's sexual predisposition."

two Rule 412 pre-trial motions had been denied, and after he assured the district judge in a sidebar that the anticipated testimony would not violate Rule 412. *Id.* at 1107. We concluded that "defense counsel's introduction of [the] testimony was a knowing and intentional violation of Rule 412" and further held that "[i]f left unsanctioned, defense counsel's behavior in this case would undermine the very purpose and force of Rule 412's strictures." *Id.* at 1108. In this case, the district court did not abuse its discretion in concluding that the Sanctionees' failure to produce relevant documents despite their affirmative obligations to do so pursuant to Rules 26 and 34, and their misrepresentations in numerous discovery disputes (which the district court estimated took "approximately sixteen hours in court"), was tantamount to bad faith. The Sanctionees' conduct in this matter undermines the very purpose of the federal rules requiring disclosure of relevant and responsive documents.

It is clear the district court did not abuse its discretion in concluding that Hancock, Musnuff, and Goodyear acted in bad faith in this litigation. The Sanctionees, throughout numerous discovery dispute filings and hearings, convinced the district court that Goodyear had produced all test data relevant to the Haegers' claims. The district court noted that "[i]n fact, at various points the Court became exasperated with Plaintiffs' apparently unsubstantiated claims that additional information must exist." It was not until the sanctions proceedings that the district court realized that the Sanctionees had

> adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior.

The Haegers served their First Request in September 2006. The Sanctionees merely objected to this request, and did not produce any documents. The Sanctionees then filed supplemental responses in November 2006, which included the production of only one group of tests – the FMVSS119 DOT tests. It was not an abuse of discretion for the district court to find that production of just one group of tests meant that the Sanctionees had failed to search properly for relevant G159 tests in response to the Haegers' First Request, and had done so in bad faith.

The Sanctionees then failed to disclose promptly relevant G159 tests after a proper search had been conducted. Musnuff and Hancock had the High Speed tests in their possession at the latest in February 2007, yet failed to disclose promptly the High Speed tests to the Haegers. Instead, the Sanctionees chose to depose the Haegers' expert in May 2007, and then produce the High Speed tests in June 2007. Musnuff was next aware of more tests – including the Heat Rise tests, DOT endurance tests, crown durability tests, and bead durability tests – at least by August 2007, and Hancock was aware of these same tests at least by June 2008.

However, the Sanctionees again failed to disclose properly these tests upon their discovery. Without producing any of these additional tests, Goodyear settled with the Haegers in April 2010.

The district court concluded that the Sanctionees should have turned over the High Speed tests, Heat Rise tests, DOT endurance tests, crown durability tests, and bead durability tests as soon as they were discovered, as they were all responsive to the First Request. The district court did not abuse its discretion in concluding that this decision to withhold documents "was a bad faith attempt to hide responsive documents," which would not have been uncovered but for the sanctions proceedings. This finding of bad faith is bolstered by Hancock's repeated representations to the district court that Goodyear was complying with all discovery requests when in fact, Goodyear was withholding relevant and responsive documents.

Any attempt by Goodyear to argue that the district court abused its discretion in preventing Goodyear from passing the blame on to its attorneys is unavailing. Goodyear "is deemed bound by the acts of [its lawyers] and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634 (1962); *see also Lockary v. Kayfetz*, 974 F.2d 1166, 1169-70 (9th Cir. 1992). Additionally, the district court did not abuse its discretion in concluding that Goodyear participated directly in the discovery fraud: Goodyear's Rule 30(b)(6) witness, authorized to testify on Goodyear's behalf, falsely testified during deposition that no

additional tests were available beyond the High Speed tests that had been turned over to the Haegers; and Goodyear's in-house counsel, Okey, maintained responsibility for reviewing and approving all the incomplete and misleading discovery responses.

We hold that it was not an abuse of discretion for the district court to find that Hancock, Musnuff and Goodyear each acted in bad faith.

B. Monetary Sanctions

Once a district court makes a finding of bad faith, it has the discretion to "award sanctions in the form of attorneys' fees against a party or counsel.'" *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (quoting *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997)). "A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." *Chambers v. NASCO*, 501 U.S. 32, 44-45 (1991).

In its analysis of sanctions, the district court noted that due to the extent of the bad faith of the Sanctionees in this case, had the misconduct "come to light while the case was ongoing, entry of default judgment with a trial on damages would have been the obvious solution." However, since the case was settled and closed before the misconduct was discovered, the court instead was faced with the task of determining the appropriate amount of sanctions to make the Plaintiffs whole in the form of attorneys' fees and costs. The court found that the Sanctionees had engaged in a

"years-long course of misconduct," which had made it difficult for the court to "separate the fees incurred due to legitimate activity from the fees and costs incurred due to Goodyear's refusal to abide by clear and simple discovery obligations." The court explained that "if Goodyear had responded to Plaintiffs' First Request with all responsive documents, Goodyear might have decided to settle the case immediately," and thus it was possible to "conclude practically all of Plaintiffs' fees and costs were due to misconduct." The district court concluded that "[w]hile there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith, based on Goodyear's pattern and practice in G159 cases, the case more likely than not would have settled much earlier." Thus the district court was informed in part by past settlement practices of Goodyear in the Other G159 Cases in reaching its determination concerning appropriate compensatory damages in this case. The district court then determined, relying upon the reasoning in *Chambers*, that while "[i]t is difficult to reconcile *Chambers* with . . . *Miller*," "the most appropriate sanction is to award Plaintiffs all of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request" as this "was the first definitive proof that Goodyear was not going to cooperate in the litigation process." The district court held that "in these unique circumstances, it is inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct; proving that linkage is an almost impossible task given how the misconduct permeated the entirety of this case."

The Sanctionees claim that this determination was made in error because sanctions must be directly linked to damage caused by its bad faith conduct, citing *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011). The Sanctionees' confidence in *Miller* is misplaced, for at least two reasons: (1) to the degree *Miller* can be read to require that the specific amount of attorneys' fees and costs awarded when a court invokes its inherent powers must be directly linked to the bad faith conduct, it flouts controlling United States Supreme Court case law; and (2) under *Chambers*, the district court did all it was required to do in this case in determining the appropriate amount of fees to award as sanctions to compensate the Plaintiffs for the damages they suffered as a result of Sanctionees' bad faith.

The panel majority's opening paragraph in *Miller* characterized the case as follows: "This is a strange case. Its resolution hinges on the absence, as a factual matter, of something we must accept as a legal matter. There are unlikely to be many more like it, so this opinion's precedential value is probably limited." *Id.* at 1026. What was missing? The answer: bad faith, an essential requirement for invoking the district court's inherent powers. *Miller* was a wrongful death suit brought against the City of Los Angeles, its police department, police chief, and a sergeant who shot and killed the decedent. The district court "issued an in limine order precluding defendants from arguing that the decedent was armed when he was shot." *Id.* at 1026. The district court found that during the trial's

summation, defense counsel violated its in limine order by stating that before decedent was shot, decedent had shot another man, and awarded sanctions under its inherent power for the entire cost of the trial after the jury hung. Counsel conceded that he had violated the court's order, and even apologized for his error, but the district court nevertheless construed counsel's conduct as "tantamount to bad faith," granted plaintiffs' motion for sanctions, and sanctioned defendants $63,687.50. *Id.* There was just one problem. A careful review of the record showed that counsel hadn't actually violated the court's in limine order, despite his confession that he had done so. That put the majority of our panel into a quandary. What should one do about a lawyer who confesses a non-existent error? In this case, the panel majority concluded that it was bound by what the lawyer had confessed, but that since the lawyer had not conceded bad faith, and clearly had not actually violated the court's order, there could be no finding of bad faith. Put another way, "you can't have a bad faith violation without a violation." *Id.* at 1029. The case was over, since a district court cannot use its inherent power to sanction a party without a finding of bad faith.

But even the subsequent analysis in *Miller* is of little help to the Sanctionees here. *Miller* addressed whether the district court linked the alleged bad faith conduct to the harm suffered, i.e., whether the district court found that the attorney's alleged statement caused the jury to hang. The panel concluded that "without a finding that [defense counsel's violation]

caused the first jury to hang, the district court had no power to order defendants to compensate plaintiffs for the attorneys' fees and costs they spent on the first trial." *Id.* Thus, while *Miller* suggests that harm is necessary to compensate a party, *Miller* makes no holding on the measure of attorneys' fees allowed once it is clear that the bad faith of a party has actually caused harm.[5] In this case, however, there is no doubt that the Sanctionees' bad faith conduct caused significant harm in forcing the Haegers to engage in sham litigation, and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses of the Sanctionees, as found by the district court in light of Goodyear's conduct in the Other G159 Cases.

Even though *Miller* does not provide an answer, we next consider how close a link is required between the harm caused and the compensatory sanctions awarded when a court invokes its inherent power. The question is squarely answered by *Chambers v. NASCO, Inc.*, the Supreme Court's strongest statement about the use of a court's inherent power. 501 U.S. 32 (1991). In *Chambers*, the Supreme Court upheld a district court's determination that "full attorney's fees were

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[5] *In re Dyer*, 322 F.3d 1178 (9th Cir. 2003), also cited by the panel, involved the violation of an automatic stay in bankruptcy, and a purported sanctions award based on the bankruptcy court's statutory contempt power, granted by 11 U.S.C. § 105(a). Our panel found that a bankruptcy court has no authority to impose a non-compensatory "serious punitive" sanction. *Id.* at 1195. This holding, of course, has no bearing on this case. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1109 (9th Cir. 2002) also referenced by the *Miller* panel, is discussed *infra*.

warranted due to the frequency and severity of [the party]'s abuses of the judicial system." 501 U.S. at 56. The underlying action in *Chambers* was a suit by NASCO seeking Chambers's specific performance of an agreement to sell a television station's facilities and broadcast license to NASCO. Chambers responded to the suit by attempting to put the properties at issue beyond the reach of the district court through various transfers, ignoring the district court's preliminary injunction, filing meritless motions and pleadings, attempting to conduct depositions in violation of the Federal Rules of Civil Procedure, and engaging in other behavior aimed at frustrating the possibility of specific performance. The district court found these actions to be "part of a sordid scheme of deliberate misuse of the judicial process designed to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Id.* at 57 (internal quotation marks omitted).

The district court then awarded NASCO an amount "which represented the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. The Supreme Court dismissed Chambers's argument, which was virtually identical to the causation requirement claim the Sanctionees are making in this case, that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong," and instead upheld the district court's conclusion "that full attorney's fees were warranted due to the frequency and severity of Chambers's abuses of the judicial system and the

resulting need to ensure that such abuses were not repeated." *Id.* at 57. The Supreme Court further explained that it was within the district court's discretion to "compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* The Supreme Court reasoned that the district court "imposed sanctions for the fraud [Chambers] perpetrated on the court and the bad faith he displayed toward both his adversary and the court throughout the course of litigation." *Id.* at 55 (internal citations and quotation marks omitted). And, such sanctions both "vindicat[e] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[e] the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 46 (internal citation and quotation marks omitted); *see also Hutto v. Finney*, 437 U.S. 678, 691 (1978). As a United States Supreme Court case, *Chambers* clearly trumps *Miller*, to the degree *Miller*'s dicta conflicts with *Chambers*, as well as any other Ninth Circuit case to the contrary. Thus, even though the district court in this case struggled with how to reconcile *Miller* with *Chambers*, it appropriately awarded the Haegers all their attorneys' fees and costs in prosecuting the action once the Sanctionees began flouting their clear discovery obligations and engaging in frequent and severe abuses of the judicial system.

Given the teaching of *Chambers*, the district court's findings and ruling in this case regarding monetary sanctions fully comply with law. First, the Supreme Court expressly rejected the linkage argument made by the Sanctionees here when it upheld the

award for full attorney's fees "due to the frequency and severity of Chambers's abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." *Chambers*, 501 U.S. at 57. Secondly, it made clear that we review the district court's determinations in arriving at the proper measure of compensatory damages for abuse of discretion. *Id.*

The district court here used the lodestar method to calculate the appropriate amount of fees incurred as a result of the Sanctionees' bad faith, and noted that this "method contemplates multiplying the 'reasonable hourly rate' by the number of hours 'reasonably expended.' *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996)." The district court then went to great lengths in reviewing the "240 pages of time entries" submitted by the Haegers, and the combination of objections by Goodyear and its attorneys to "[a]lmost every time entry" to ensure "the appropriate size of the award." In a nineteen-page order, the district court addressed each objection made by the Sanctionees to the court's proposed award, and made five adjustments based on these objections: 1) "out of an abundance of caution," the district court imposed a twenty percent reduction of $29,310 for recreation of time entries; 2) the district court held that because some of the time entry descriptions were vague and/or incomplete, it could not conclude that this time was reasonably expended absent the appropriate information, and reduced the award by $32,117; 3) the district court reduced the award by $4,880.73, equaling the costs for

which the Haegers did not submit supporting documents; 4) the district court subtracted $50,721 for time entries involving work of a clerical nature; and 5) the district court found that $25,827.50 should be reduced for excessive billing. Applying these adjustments, the district court awarded the amount the court reasonably believed it cost the Haegers to litigate against a party and attorneys during the time when that party and those attorneys were acting in bad faith. Nothing more is required under *Chambers* or our case law, and, especially given the great care with which the court reviewed the relevant data during its consideration of legal fees, the court clearly did not abuse its discretion.

Our dissenting colleague suggests that *Chambers*'s control over this case was undermined by *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), and our own *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128 (9th Cir. 2001). He also suggests that the district court's sanctions in this case were punitive, not compensatory. With due respect, our colleague is mistaken on both counts. *Bagwell* involved a criminal contempt proceeding stemming out of a protracted labor strike, in which a union was found to have violated the trial court's orders hundreds of times, as determined in eight separate contempt hearings. Although the trial court labeled the over $64 million it levied in fines against the union "civil and coercive," *Bagwell*, 512 U.S. at 824, once the union and the companies settled their labor dispute, and moved to vacate the contempt fines, the

trial judge refused to do so, declaring that they were "payable in effect to the public." *Id.* at 825. The Supreme Court appropriately treated the fines as punishment for "criminal contempt," and required courts to provide additional protections to the defendants in such cases. *Id.* at 826. However, even though *Chambers* had been decided only 3 years before by the Supreme Court, *Bagwell* did not even mention *Chambers*, let alone overrule or distinguish it. Contrary to the facts in this case, the Court noted:

> [N]either any party nor any court of the Commonwealth has suggested that the challenged fines are compensatory. At no point did the trial court attempt to calibrate the fines to damages caused by the union's contumacious activities or indicate that the fines were to compensate the complainant for losses sustained. The nonparty governments, in turn, never requested any compensation or presented any evidence regarding their injuries, never moved to intervene in the suit, and never actively defended the fines imposed.

Id. at 834 (internal citation and quotation marks omitted).

F.J. Hanshaw, also cited by our dissenting colleague, is extremely helpful in confirming the validity of the compensatory damages awarded in this case. *F.J. Hanshaw* involved a dispute between two wealthy brothers about a partnership dissolution. 244 F.3d at 1132. Just as a court-appointed receiver was about to render an accounting to the court, one of the brothers,

Frederick J. Hanshaw (FJH), allegedly offered the receiver a bribe of $100,000, as well as future business. *Id.* at 1132-33. When the attempted bribe came to the attention of the district court, the court referred the matter to the FBI, which, after conducting several interviews, decided not to proceed with formal criminal charges against FJH. *Id.* at 1133. Thereafter, the district court conducted two evidentiary hearings to determine whether FJH had attempted to defraud the court and his brother. *Id.* at 1133-34. After weighing the evidence, the court concluded that there had been an attempt by FJH to bribe the receiver, and sanctioned FJH and his corporation $500,000, payable to the United States, and imposed a $200,000 sanction against them in favor of his brother, Gordon Hanshaw (GH). *Id.* at 1135. Relying on *Bagwell*, our court found that the $500,000 sanction was "clearly punitive and intended to vindicate the court's authority and the integrity of the judicial process. The sanction was a substantial 'flat, unconditional fine'; was not intended to compensate [GH] but rather was made payable to the United States. . . ." *Id.* at 1138. Since the $500,000 sanction was found to be punitive in nature, we reversed the district court because FJH and his corporation did not receive all the procedural protections to which they were entitled. *Id.* at 1139-40, 1145.

However, we upheld the district court's $200,000 sanction in favor of GH, despite FJH's contention that it too was criminal in nature and should be vacated. *Id.* at 1142, 1145. We noted that: (a) "[u]nlike a punitive sanction, particularly one that is payable to the

government or the court, a compensatory award payable to a party does not place the court in a prosecutorial role"; (b) "[w]hen determining whether and how much to compensate a party, the court sits in the same adjudicatory position it does when it resolves most disputes. Although the court has an institutional interest in the matter, the court in essence is resolving a dispute between litigants: one party claims it was wronged by the other and wants to be reimbursed by the losses it sustained. For these reasons, when the court is adjudicating a compensatory civil sanction, the traditional procedural protections applicable to civil proceedings are sufficient to satisfy the Constitution's requirement of due process"; (c) in concluding that the $200,000 award to GH was compensatory, we reasoned that "[t]he award was payable to [GH] . . . and was meant to offset the expenses he incurred because of [FJH's] misconduct. As a result of the bribe attempt, the entire receivership process was delayed by nearly six months and [GH] was forced to incur additional attorney fees. The court had before it the billing reports from [GH's] attorneys and [GH] had asked the court for $824,000 in compensation. . . . Exercising its discretion, the court awarded $200,000 to [GH]"; and (d) "[b]ased upon this record, we conclude that the $200,000 award was intended to compensate [GH] for losses sustained as a result of [FJH's] misconduct and is civil in nature." *Id.* at 1142 (citing *Chambers*, 501 U.S. at 56-58).

Just like the district court did in *F.J. Hanshaw* in its $200,000 award to GH, the court here responded to

a complaint filed by the Plaintiffs seeking damages for the Sanctionees' bad faith, and awarded as compensatory damages the amount of the attorneys' fees and costs it carefully determined the Haegers had actually incurred litigating against the Sanctionees, during the time they were acting in bad faith.

"[W]hether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved," meaning a civil sanction is "for the benefit of the complainant," while a criminal sanction is "punitive, to vindicate the authority of the court." *Bagwell*, 512 U.S. at 827-28 (internal quotations omitted). A fine is almost always civil it if "compensate[s] the complainant for losses sustained," *Id.* at 829 (internal quotations omitted), whereas it is generally punitive in nature when it "was not intended to compensate [the party] but rather [is] made payable to the United States." *F.J. Hanshaw*, 244 F.3d at 1138. Other Ninth Circuit cases affirm these points. In *B.K.B. v. Maui Police Department*, the district court found that the sanctionees had acted in bad faith in violating the Federal Rules of Evidence while questioning a witness about the Plaintiff during trial, and awarded "$5,000 to compensate Plaintiff for the pain and suffering caused by the public embarrassment resulting from [the] testimony." 276 F.3d 1091, 1099 (9th Cir. 2002). We upheld the sanction, holding that "the amount the court imposed reflected its assessment of the actual harm incurred by Plaintiff . . . [in] emotional and reputational damage." *Id.* at 1109. Because the district court imposed the

sanctions for the purpose of compensation, they were within its discretion.

The district court in *Lasar v. Ford Motor Company* imposed monetary sanctions to compensate "for unnecessary costs and attorney's fees." 399 F.3d 1101, 1111 (9th Cir. 2005). In *Lasar*, the sanctionees' attorney violated pretrial orders during his opening statement, and the court granted Lasar's motion for mistrial and discharged the jury. *Id.* at 1106. The district court then instructed "Lasar's attorneys to prepare an affidavit detailing Lasar's costs and attorney's fees incurred over the previous two weeks." *Id.* While it is unclear why the district court determined that Lasar should be compensated for two weeks of attorney's fees, the sanctions were upheld as we determined that "[t]he monetary sanctions imposed . . . were compensatory in nature because they were designed to compensate Lasar for unnecessary costs and attorney's fees." *Id.* at 1111. Thus, it was within the district court's discretion to determine the time frame in which Lasar sustained "losses."

Collectively, these cases make clear that the sanctions awarded here were entirely lawful and appropriate. Not one dime was awarded to the government or the court. Just like the district court in *F.J. Hanshaw*, the district court here awarded compensatory damages after the aggrieved party filed suit, or filed a motion, seeking compensation for damages suffered as a result of the bad faith of the opposing party. In awarding compensatory damages, the district court did not act as a

prosecutor, but instead allowed the accused and accusing parties to file extensive briefs, and held extensive hearings to determine the truth of what had happened. It took great care in parsing and reducing the attorney fee claims of the Plaintiffs. The accused were granted full due process and afforded all the protections required in civil sanctions hearings. While the district court had an institutional interest in the proceedings (just like the district court did in *F.J. Hanshaw*), its stated purpose was to properly compensate the Plaintiffs for damages they suffered as the result of the Sanctionees' fraudulent conduct. In sum, the district court acted well within its discretion in awarding all the attorneys' fees and costs incurred by the Plaintiffs after Goodyear served its supplemental responses to Plaintiffs' First Request.

C. Non-Monetary Sanctions

The district court also used its inherent power to order Goodyear to file a copy of the Order in any G159 case initiated after the date of that Order. The district court reasoned that "[b]ased on Goodyear's history of engaging in serious discovery misconduct in every G159 case brought to this Court's attention, filing this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in the past, not operated in good faith when litigating such cases." The district court found that this would "serve as a notice of the existence of certain tests Goodyear attempted to conceal in previous cases." The district court did not limit

this requirement in either time or scope. Goodyear argues that this sanction is too severe as it impacts the fairness of unrelated proceedings, and thus should be reversed as an abuse of the district court's discretion.

Courts have the inherent power to impose various non-monetary sanctions. *See Thompson v. Hous. Auth. of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (inherent power includes power to "impose sanctions including, where appropriate, default or dismissal"); *Anheuser-Busch, Inc. v. Natural Beverage Distribs.*, 69 F.3d 337, 348 (9th Cir. 1995) (dismissal pursuant to inherent powers); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming order striking answer and entering default judgment). However, even if a given sanction is available, the scope of the sanction must also be appropriate. *Lewis v. Tel. Emps. Credit Union*, 87 F.3d 1537, 1558 (9th Cir. 1996). A sanction should be "carefully fashioned to deny [the party] the fruits of its misconduct yet not to interfere with [the party's future rights]." *Id.*

In *Hale v. U.S. Trustee*, a bankruptcy court imposed a sanction that regulated future conduct "in response to specific and repeated acts of incompetent and irresponsible representation." 509 F.3d 1139, 1149 (9th Cir. 2007). The court found a bankruptcy attorney to be "[u]nable or unwilling to conform his conduct to the requirements established by the Court's prior decisions and ruling, and to the standards by which all other debtors' counsel in the District abide." *Id.* at 1145. We upheld the bankruptcy court's sanction which required that the attorney "not file, nor shall he prepare or

cause to be prepared for filing by a debtor, any bankruptcy petitioner unless [the attorney] signs said petition." *Id.* Additionally, the attorney was directed not to file, nor assist a debtor as counsel in filing, "any bankruptcy petition unless [the attorney] commits to such debtor to meet the ethical and professional obligations of a debtor's attorney and provide the reasonable and necessary services required to properly represent a debtor in a bankruptcy case." *Id.* Thus, this chosen sanction regulated the attorney's practice and specific actions that the attorney was required to take with all future clients. We held that "[u]nder the specific acts of this case, we cannot say that the bankruptcy court abused its inherent power to impose sanctions." *Id.* at 1149.

We are persuaded by the reasoning of *Hale*. We are also persuaded by the reasoning of *Gallop v. Cheney*, a Second Circuit case addressing the same issue. 667 F.3d 226 (2d Cir. 2012). The Plaintiff's claims in *Gallop* were dismissed by the district court as frivolous, and the Second Circuit affirmed the dismissal on appeal. *Id.* at 228. The Second Circuit then ordered Plaintiff and her counsel, including Dennis Cunningham, to show cause why the Court should not impose sanctions for what it held to be a frivolous appeal. In response, Plaintiff moved to "disqualify the three members of the panel from considering her petition for rehearing and rehearing in banc." *Id.* The Court sanctioned Plaintiff's counsel for filing a frivolous appeal, and then imposed additional sanctions for filing the frivolous motion to disqualify. *Id.* at 230. The Court held that

"Cunningham acted in bad faith in demanding the recusal of the three panel members and any like-minded colleagues," and ordered Cunningham to "provide notice of the sanctions imposed upon him in this case . . . to any federal court in this Circuit before which he appears or seeks to appear" for a period of one year. *Id.*

The district court here imposed the non-monetary sanction so that future plaintiffs and courts would be alerted that Goodyear had previously not operated in good faith, and so that future plaintiffs would be aware of the types of G159 tests available. We agree with the district court's reasoning, particularly in light of the fact that it is highly likely that most future G159 litigation will be filed in state courts (*see, e.g.*, the Other G159 Cases), and state court counsel will not necessarily investigate what might be contained in the Federal Reporter about the conduct of Goodyear and its counsel. We note also that the district court provided a form of safety valve in its non-monetary sanctions because "Goodyear may apply to the court hearing the case to be excused from [the requirements of the Order]."

We find that the district court's imposition of non-monetary sanctions against Goodyear is balanced, is narrowly tailored, and imposes no sanctions beyond what is necessary to remedy what the district court properly perceived as an ongoing problem in Goodyear's G159 litigation. The district court did not abuse its discretion in imposing non-monetary sanctions on Goodyear.

CONCLUSION

For the reasons noted in this opinion, we hold that the district court did not abuse its discretion in imposing sanctions in the sum of $548,240 against Hancock, and $2,192,961 jointly against Musnuff and Goodyear. The district also did not abuse it discretion in imposing non-monetary sanctions against Goodyear.

We affirm the monetary and non-monetary sanctions set forth in the district court's Order.

The Sanctionees shall bear all costs in this appeal.

AFFIRMED.

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WATFORD, Circuit Judge, dissenting:

Goodyear and its lawyers were accused in this case of perpetrating a fraud on the Haegers and the court. If sustained, those charges could of course severely damage the professional reputations of the lawyers involved. The district court accordingly approached the task of determining whether the charges were true with great thoroughness and care. After conducting a lengthy evidentiary hearing and reviewing multiple rounds of briefing, the court concluded that Goodyear and its lawyers acted in bad faith when they failed to produce test results that were responsive to the Haegers' document requests. I agree with the majority that the district court's misconduct findings

are supported by the record, but I nevertheless conclude that the $2.7 million sanctions award must be vacated.

The district court's finding of bad faith authorized it to levy sanctions under its inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991). Those sanctions could have taken one of two forms: punitive sanctions, which are criminal in nature and intended to vindicate the authority of the court; or compensatory sanctions, which are civil in nature and designed to compensate the injured party for losses sustained as a result of the misconduct. *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029-30 (9th Cir. 2011); *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128, 1136-42 (9th Cir. 2001).[1]

The district court chose not to impose punitive sanctions. Doing so would have required the court to follow procedures applicable in criminal cases, such as appointing an independent prosecutor, affording the accused the right to a jury trial, and demanding proof of misconduct beyond a reasonable doubt. *Miller*, 661 F.3d at 1030. Compensatory sanctions, by contrast, may be imposed by the court acting alone after providing adequate notice and an opportunity to be heard. *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir.

[1] Sanctions may also be civil in nature if they are "designed to compel future compliance with a court order." *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 827 (1994). The sanctions imposed here could not serve that function because the litigation between the Haegers and Goodyear had long since ended.

2005). That is the route the district court chose to follow here. The question for us is whether the court correctly labeled the sanctions compensatory. If it did not – if the sanctions are instead punitive – they cannot stand. *See Miller*, 661 F.3d at 1029-30; *F.J. Hanshaw*, 244 F.3d at 1141-42.

In my view, the $2.7 million sanctions award cannot be deemed compensatory. The award could be compensatory only if the record reveals a causal connection between the misconduct the court found and the amount it awarded. *See Miller*, 661 F.3d at 1029-30. The $2.7 million award represents all of the attorney's fees incurred by the Haegers after Goodyear breached its discovery obligations, including fees for the years of litigation that ensued before the parties settled on the first day of trial. The court purported to find the necessary causal link between the misconduct and the fees awarded on the theory that, if Goodyear had produced the test results when it was supposed to, "the case more likely than not would have settled much earlier." I do not think that finding is supported by the record.

Our decision in *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011), illustrates the deficiency. In that case, the district court found that defense counsel violated an in limine order by suggesting during closing arguments that the decedent was armed when the defendant police officer shot him. *Id.* at 1026. The trial ended in a hung jury. The district court awarded the plaintiffs all fees incurred during the trial as a compensatory sanction, presumably on the theory that defense counsel's improper closing argument caused the

jury to hang, thus necessitating a retrial and rendering all of the fees incurred during the first trial a waste. We concluded that the award could not be deemed compensatory. *Id.* at 1030. The record did not establish a causal connection between the lawyer's misconduct and the jury's inability to reach a verdict. It was simply impossible to know, on the record compiled in that case, why the jury could not reach a verdict, and the limited evidence available suggested that it was not because of defense counsel's improper remarks. *Id.*

The record in this case is similarly devoid of evidence establishing a causal link between Goodyear's misconduct and the fees awarded. It's anyone's guess how the litigation would have proceeded if Goodyear had disclosed all responsive test results from the start. The case might have settled right away, as the district court assumed, but that seems unlikely. The test results did not provide conclusive proof that the Haegers' tire failed due to its defective design. To be sure, the test results were favorable to the Haegers: The results supported the Haegers' theory that Goodyear sold tires that were prone to failure when used on motor homes at highway speeds, especially in hot driving conditions like those prevailing at the time of the Haegers' accident in Arizona. But even if those test results had been put before the jury, Goodyear still planned to argue that the Haegers' own tire, which had endured more than 40,000 miles of wear and tear, failed because it struck road debris, not because the tire was defective. And Goodyear has consistently maintained (whether rightly or wrongly) that the test results it concealed do

not accurately predict tire behavior in real-world driving conditions.

If anything, it seems more plausible to assume that the case would have proceeded to trial had the test results been timely disclosed. The Haegers' grievance is that they accepted a low-ball settlement from Goodyear on the eve of trial under false pretenses. The concealed test results, they contend, would have significantly strengthened their hand. That suggests the Haegers would have been willing to take their case to the jury if Goodyear had refused to increase its offer, but it does not suggest that Goodyear would have thrown in the towel and met the Haegers' demands. In fact, the only relevant data point in the record supports the opposite conclusion. In the *Schalmo* case, one of the other motor home accident suits involving the same allegedly defective tire, Goodyear produced the test results at issue, but the plaintiffs and Goodyear elected to take the case to trial (with the jury returning a sizeable verdict for the plaintiffs). Goodyear did not settle that case immediately upon disclosure of the test results, as the district court assumed would have happened here.

In short, we simply don't know – and have no way of reliably figuring out – what would have happened if timely disclosure of the test results had occurred. Thus, I think the district court clearly erred in finding that "the case more likely than not would have settled much earlier" had Goodyear disclosed the test results when it should have.

The majority does not contend that a causal connection between Goodyear's misconduct and the fees awarded has been shown here, as required for the sanctions to be deemed compensatory. The majority instead contends that *Miller*'s causation requirement "flouts controlling United States Supreme Court case law." Maj. op. at 30. I don't think that's true. *Miller*'s discussion of causation did not break new ground; it simply reflects the well-established principle, fully consistent with Supreme Court precedent, that a sanction can be deemed compensatory only if it compensates the injured party for losses sustained *as a result of* the sanctionable misconduct. *See, e.g.*, *Lasar*, 399 F.3d at 1111; *F.J. Hanshaw*, 244 F.3d at 1142. What we said about causation in *Miller* merely illustrates why the fees awarded in this case were not sustained *as a result of* Goodyear's misconduct.

The majority reads *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), as establishing a competing principle: that a fee award may be deemed compensatory even if the fees were *not* incurred as a result of the sanctionable misconduct, so long as the misconduct involves "frequent and severe abuses of the judicial system." Maj. op. at 30. The majority assumes that principle must be valid because, in its view, not all of the fees awarded to NASCO were incurred as a direct result of Chambers' misconduct.

I see two problems with the majority's reading of *Chambers*. First, it is by no means clear as a factual matter that the majority's reading is correct. The district court in *Chambers* expressly held that Chambers'

misconduct began even before NASCO formally filed suit. After Chambers informed NASCO that he would not honor the agreement to sell his local television station, NASCO gave Chambers notice on a Friday that it intended to file suit the following Monday seeking specific performance. That advance notice was required by court rules because NASCO also intended to seek a temporary restraining order preventing Chambers from disposing of the station pending resolution of the suit. 501 U.S. at 36. Rather than acknowledge that he had no valid defense to the suit, and that he therefore had no business putting NASCO to the expense of filing it, Chambers embarked on what turned out to be a years-long campaign of bad-faith litigation misconduct, beginning with his efforts over the weekend to fraudulently transfer ownership of the station in order to deprive the district court of jurisdiction. *Id.* at 36-37. Because the district court found that Chambers never had a good-faith basis for resisting the relief NASCO sought, and that all of the actions he took in "defending" the suit were aimed solely at obstructing and delaying the inevitable sale of the television station, it seems fair to say that all of NASCO's attorney's fees were incurred as a direct result of Chambers' misconduct. *See id.* at 50-51.

Second, even if some portion of NASCO's attorney's fees were *not* incurred as a direct result of Chambers' misconduct, the majority incorrectly assumes that the Supreme Court upheld the award as purely compensatory. The sanction imposed there

was not purely compensatory; it served the "dual purpose" of (1) vindicating the court's own authority and (2) "mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* at 46 (internal quotation marks omitted). The first of these purposes, we have subsequently held, is the domain of punitive sanctions, and the Court in *Chambers* left no doubt that punishment was indeed a key purpose of the sanctions imposed in that case. *See id.* at 55 n.17 ("the sanctions imposed on Chambers were aimed at punishing not only the harm done to NASCO, but also the harm done to the court itself"). Because it was partly punitive, the sanctions award did not need to be limited to fees directly caused by Chambers' misconduct.

I concede that the district court imposed the sanctions in *Chambers* without applying the heightened procedural protections we have subsequently held are necessary before punitive sanctions may be imposed, and that the Supreme Court nonetheless affirmed. I don't think we can read anything into that fact. The defendants in *Chambers* did not raise any due process arguments, and the Supreme Court therefore did not address whether the process afforded the defendants was adequate. Moreover, the law has changed since *Chambers* was decided. A few years later the Court issued *International Union, United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), the case from which we first derived the rule that imposition of punitive sanctions must be accompanied by the procedural protections applicable in criminal cases. *See F.J. Hanshaw*, 244 F.3d at 1137-38. If any doubts lingered about

whether *Chambers* authorizes imposition of so-called "dual purpose" sanctions without following the procedures applicable in criminal cases, we put those to rest in *Miller*. The dissent in *Miller* made that very argument, 661 F.3d at 1039 (Ikuta, J., dissenting), but the panel majority implicitly rejected it. *See id.* at 1030.

None of this is to suggest that compensatory sanctions can't be fashioned at all. There may well be other ways to calculate the losses sustained by the Haegers as a result of the misconduct. For example, the most direct loss the Haegers sustained is that they probably settled their case for less than it was really worth. It might be possible to use the *Schalmo* case, and others like it if they exist, to calculate the difference between what the Haegers actually received in settlement and what they likely would have received – whether through an enhanced settlement or a jury verdict – if the test results had been disclosed in a timely manner. But going down that path would obviously be fraught with proof problems of its own.

Alternatively, instead of attempting to calculate lost settlement value, the district court could again focus on attorney's fees incurred by the Haegers, limiting the award to fees that can be linked in a non-speculative way to the misconduct. The fees that most readily spring to mind are those wasted on expert discovery that took place under the mistaken assumption that key test results supporting the Haegers' liability theory did not exist. Those and other fees similarly traceable to the misconduct are no doubt comparatively small, but I don't think the district court was

right in suggesting that calculating them would be an impossible task. Those fees can be calculated; it's just that they may produce a sanction smaller than seems warranted given the severity of the misconduct the district court found.

If the sanctions that can properly be deemed compensatory seem too paltry under the circumstances, the district court could still fashion an award of punitive sanctions, so long as it applies the corresponding heightened procedural protections. *See Miller*, 661 F.3d at 1030-31; *F.J. Hanshaw*, 244 F.3d at 1141-42. Because Goodyear and its lawyers were not afforded those protections before punitive sanctions were imposed, I dissent from the majority's affirmance of the $2.7 million award.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al., Plaintiffs, vs. Goodyear Tire and Rubber Co., et al., Defendants.	)	No. CV-05-02046-PHX-ROS **ORDER** (Filed Aug. 26, 2013)

On June 26, 2013, the Court gave the parties one last opportunity to reach agreement regarding the amount of attorneys' fees to be awarded based on misconduct by Graeme Hancock, Basil Musnuff, and Goodyear Tire and Rubber Co. ("Goodyear"). The parties could not reach agreement and they profoundly object to referring the issue to a special master. Rather than prolong this case any further, the Court now resolves the appropriate amount of attorneys' fees and costs.

I. Reasonable Attorneys' Fees and Costs

In its June 26, 2013 Order, the Court explained that it would use the lodestar method to calculate the appropriate amount of fees. That method contemplates multiplying the "reasonable hourly rate" by the number of hours "reasonably expended." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). The prior order determined the appropriate hourly rates. Now the Court must determine the reasonable number of

hours. The parties present vastly different views on this issue.

To begin, the Supreme Court has made clear that determining the appropriate amount of attorneys' fees "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The Supreme Court recently stressed that, when determining the size of a fee award, "trial courts need not, and indeed should not, become green-eyeshade accountants." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011). A court should not strive to "achieve auditing perfection" but should attempt "to do rough justice." *Id.* And in doing so, a court may "take into account [its] overall sense of a suit" and may even "use estimates in calculating and allocating an attorney's time." *Id.*

Despite this Supreme Court authority, the Ninth Circuit has repeatedly chided district courts for not providing an adequate explanation of their decisions regarding attorneys' fees. For example, the Ninth Circuit recently claimed that it would only be "a small matter" for district courts "to abide by the injunction of the arithmetic teacher: Show your work!" *Padgett v. Loventhal*, 706 F.3d 1205, 1208 (9th Cir. 2013) (quotation omitted). Therefore, the Court will attempt to make as clear as possible how it calculated the appropriate award. It is worth keeping in mind, however, that when the attorneys' fees at issue run into the thousands of hours and millions of dollars, it is exceptionally difficult to assess each and every billing entry with absolute clarity and consistency. *Cf. Salstrom v. Citicorp Credit Services, Inc.*, 74 F.3d 183, 185 (9th Cir.

1996) ("[I]t would be impossible to determine with mathematical precision the amount of attorney's fees and costs incurred by Citicorp as a direct result of Gudger and Webb's misconduct.").

A. General Objections

Goodyear and its attorneys propose a system of nine different codes for the Court to use when evaluating the approximately 240 pages of time entries. (Doc. 1100). Almost every time entry is accompanied by some combination of the nine codes. Unfortunately, even a cursory review raises concerns about the good faith nature of the objections. For example, Goodyear and its attorneys have objected to many entries that Plaintiffs are not seeking compensation for.[1] Those objections are obviously inappropriate. In addition, the objections are wildly inconsistent, making it exceptionally difficult to evaluate the billing records as a whole.[2] In light of the nonsensical objections to unbilled time, and the seemingly random nature of a great many other objections, it is hard to conclude Goodyear and its attorneys carefully reviewed the records.

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[1] Goodyear and its attorneys have made over forty objections to time entries that Plaintiffs' counsel are not seeking to recover. *See, e.g.*, Doc. 1100-2 at 45.

[2] Looking at two entries close in time, Goodyear and its attorneys object that the entry dated 2/1/07 stating "telephone conference with client" is too "vague and/or incomplete." But there is no objection to the 2/22/07 entry stating, in its entirety, "review list of cases."

Much more important than these errors, however, is that the coded objections present a very misleading view of possible adjustments. Goodyear and its attorneys present totals under each of the nine different codes. But sustaining a global objection to any code would result in a grossly excessive deduction. For example, Goodyear and its attorneys claim that sustaining their Code H objections ("excessive billings/fees") should result in a reduction of $375,772.50. (Doc. 1100-3 at 2). But this amount is derived by assuming the Court will disallow, in its entirety, any entry allegedly containing "excessive time." So the time entry on 5/18/07 reflecting twelve hours for attending an expert deposition would be reduced to zero, even though there can be no question that *some* time on that date was appropriately billed. Thus, the code system presents the situation as one where the Court could merely pick the meritorious codes and then subtract the total allegedly attributable to each code. That is not, in fact, the case.

The code system and accompanying totals are also misleading because they do not take into account that the codes often overlap. Therefore, if the Court were to sustain the objections based only on three of the nine codes, that would result in a larger deduction than the entire amount Plaintiffs seek.[3] Obviously the Court cannot engage in such a simplistic analysis.[4]

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[3] Sustaining the objections on Code B ($1,611,044), Code C ($603,356), and Code F ($722,406.52) would result in total deductions of $2,936,806.52.

[4] Goodyear and its attorneys recognize this flaw but do not offer an alternative method of calculation. (Doc. 1102 at 4 n.2).

Based on Goodyear and its attorneys' objections, the reductions set forth below are far less than what one might expect. But the Court has spent considerable time reviewing *each* time entry and its associated objections in an attempt to ensure the appropriate size of the award. Relying primarily on its own experience in this case, the Court makes the rulings and adjustments set forth below.

B. Nine Code System

i. Code A Objections

Code A refers to "recreated time entries for the period from August 11, 2009 through December 31, 2010." (Doc. 1100 at 2). During that time period, Plaintiffs' counsel did not maintain contemporaneous time records. While the lack of contemporaneous time records is often a problem, this case is unique.

Here, the Court is attempting to award reasonable attorneys' fees in a case where Plaintiffs never planned to seek an award of attorneys' fees. This is a contingency-based case and contingency fee attorneys often do not keep contemporaneous time records because they will never seek a fee award from the court. Thus, Goodyear and its attorneys seem to be arguing the Court should heavily discount or deny the fees described in Plaintiffs' recreated time entries because Plaintiffs failed to predict that, due to widespread discovery misconduct, they would eventually need to apply for fees. In these circumstances, disallowing fees

based on the lack of contemporaneous time records is not appropriate.

The recreation of time entries does, however, raise the prospect of overstating the time involved. *See, e.g.*, *Hensley v. Eckerhart*, 461 U.S. 424, 438 n.13 (1983) (allowing 30% reduction based on lack of contemporaneous time records). Therefore, out of an abundance of caution, the Court will impose a twenty percent reduction to those time entries reflecting Code A objections.

ii. Code B Objections

Code B refers to "block-billing." Goodyear and its attorneys claim Plaintiffs' counsel engaged in inappropriate block-billing throughout this case. But, as pointed out by Plaintiffs, it is not block-billing per se that is objectionable. Rather, the problem with block-billing is that there is often insufficient detail for the Court to determine whether the amount expended in each block was reasonable. The records here do not suffer from that flaw. Except as indicated in the context of other objections, the entries identified as block-billed contain sufficient information for the Court to assess the reasonableness of the time spent on the tasks performed. *See Campbell v. Nat'l Passenger R.R. Corp.*, 718 F. Supp. 2d 1093, 1103 (N.D. Cal. 2010)

(block billing was "detailed enough for the Court to assess the reasonableness of the hours billed").[5] Therefore, the Code B objections are overruled.

iii. Code C Objections

Code C refers to "vague and/or incomplete descriptions of the services performed." (Doc. 1100 at 2). The Court concludes that some of the Code C objections are well-taken and adjustments must be made. The vast majority of these adjustments reflect telephone calls, conferences, or emails with no indication regarding the topic of those communications. The Court cannot conclude the time was reasonably expended absent such information. Therefore, the Court makes the adjustments set forth on Appendix A. Unless listed on Appendix A, the Code C objections are overruled.

iv. Code D Objections

Code D refers to "non-taxable costs pursuant to 28 U.S.C. § 1920." (Doc. 1100 at 2). As set forth in the Court's June 26, 2013 Order, the Court will not limit the award to taxable costs. Therefore, with the exception of $4,880.73, the costs for which Plaintiffs did not

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[5] Also, in light of the Court making other objections to many of the block-billed entries, any across the board block-billing reduction would result in excessive reductions. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 842, 948 (9th Cir. 2007) (reversing across-the-board reduction for block-billing because it resulted in excessive reduction).

submit supporting documents, the objections under Code D are overruled.

v. Code E Objections

Code E refers to "multiple timekeepers performing the same tasks/duplicative fees." (Doc. 1100 at 2). Having reviewed the relevant entries, Goodyear and its attorneys have not provided a meaningful way for the Court to assess the accuracy of their contention that the entries are duplicative. In fact, Goodyear and its attorneys seem to believe that almost any time more than one attorney billed for a particular issue, only one attorney should be compensated. Given that Goodyear had over ten attorneys working on this case, the amount of discovery involved, and the complicated nature of the issues, the claim that Plaintiffs should be limited to the time one attorney spent on any given issue is not convincing. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286-87 (9th Cir. 2004) ("Courts must exercise judgment and discretion, considering the circumstances of the individual case, to decide whether there was unnecessary duplication."). The Court overrules the objections based on Code E.

vi. Code F Objections

Code F refers to "entries unrelated to the alleged harm and outside the scope of the Court's Order." (Doc. 1100 at 2). This objection takes issue with the Court's decision to award all the fees and costs incurred after it became clear that Goodyear and its attorneys were

not behaving in good faith. The Court previously explained that, in these unique circumstances, it is inappropriate to limit the award to the fees and costs that could be directly linked to the misconduct; proving that linkage is an almost impossible task given how the misconduct permeated the entirety of this case.[6] Thus, the Code F objections are overruled.

As explained in the June 26, 2013 Order, the Court will make a contingent award in the event a direct linkage between the misconduct and harm is required. For purposes of the contingent award, the Code F objections will be sustained. Goodyear and its attorneys have submitted a calculation that the Code F objections total $722,406.52. (Doc. 1100-3 at 2). Therefore, the contingent award will reflect the other appropriate deductions, as well as this deduction.[7]

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[6] Some of the Code F objections are clear evidence that Goodyear and its attorneys have not conducted a thoughtful review of their objections. For example, the time Plaintiffs' counsel spent in preparing the reply in support of their motion for sanctions is obviously directly linked to the misconduct. But Goodyear and its attorneys assert a Code F objection to some of that time. *See, e.g.*, time entries dated 10/11/2011 and 10/12/2011.

[7] As noted in footnote 5, many entries are subject to multiple objections. Therefore, sustaining more than one objection to a single entry will result in double counting that entry. For example, the entry on 11/08/06 contains an objection under Code C and Code F. The objection based on Code C was sustained, meaning sustaining the objection also on Code F will result in deducting that $33.00 twice. But there is no simple way to avoid this problem and the amount of double counting is minimal in relation to the size of the total award. Therefore, the contingent award will

vii. Code G Objections

Code G refers to "administrative and/or clerical tasks." (Doc. 1100 at 2). The overwhelming number of Code G objections are aimed at tasks performed by a paralegal and billed at the paralegal's hourly rate.[8] Goodyear and its attorneys apparently believe these entries were for the performance of "clerical" work, *i.e.* work that not even a paralegal should be allowed to bill for. (Doc. 1103 at 13, work should have been designated as unrecoverable "overhead."). Some of the entries do involve work of a clerical nature. *See Schrum v. Burlington N. Santa Fe Ry. Co.*, 2008 WL 2278137, at *12 (D. Ariz. May 30, 2008) (noting "work that is clerical in nature should be subsumed in a law firm's overhead"). Many of the time entries to which there is a Code G objection contain a mix of compensable and noncompensable activities. Therefore, the Court has determined the appropriate amount for the compensable activities while subtracting the non-compensable amounts. *See id.* (clerical tasks include "calendaring activities, scheduling depositions and bates labeling documents"). The appropriate adjustments are set

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reflect the other appropriate deductions as well as the full $722,406.52 deduction.

[8] Goodyear and its attorneys do not object to all of the billing entries by paralegals, effectively conceding that some paralegal work is recoverable. *See Trustees of Const. Industry and Laborers Health and Welfare Trust v. Redland Insurance Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006) ("[F]ees for work performed by non-attorneys such as paralegals may be billed separately, at market rates, if this is the prevailing practice in a given community.")

forth on Appendix B. If not referenced, the Code G objections are overruled.

viii. Code H Objections

Code H refers to "excessive billings/fees." Plaintiffs are only entitled to the amount of time "reasonably expended." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996). Goodyear and its attorneys believe the absolute maximum the Court could find reasonable in this case is approximately 800 hours by Mr. Kurtz and his paralegal, a little over 500 hours from all the staff at Jennings, Strouss & Salmon, and no hours from Mr. Abernethy. (Doc. 1100-4). Thus, Goodyear and its attorneys believe this case should not have required more than 1,300 hours of work. Given the history of this case, that figure cannot be taken seriously.[9]

As outlined in the sanctions order, very early in this case Goodyear and its attorneys decided to resist all discovery and fight Plaintiffs on seemingly every issue. At the time of the sanctions order, the case had involved approximately 163 motions, 254 Court orders, and close to 1,000 docket entries. (Doc. 1073 at 50

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[9] Goodyear and its attorneys chose not to submit their own billing records for comparison purposes. While there is no requirement that they do so, the Ninth Circuit has recognized that comparing the time spent by the opposing side can be a "useful guide in evaluating the appropriateness of time claimed." *Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1287 (9th Cir. 2007). If Goodyear and its attorneys actually believed that Plaintiffs spent close to *five thousand hours* more than necessary, their own billings of far fewer hours would have been powerful and persuasive evidence in support of that position.

n.21). That is *substantially* more activity than the vast majority of cases, including even more complex cases that proceed through trial. And while docket activity can be a useful proxy for determining the amount of attorney time devoted to a case, docket activity alone can be misleading because it may not reflect time spent in discovery. In this case, the time spent in discovery was massive and greatly inflated because of the misconduct by Goodyear and its attorneys. Accordingly, the general complaint by Goodyear and its attorneys that Plaintiffs' counsel spent too much time on this case, when the monumental expenditure of time was caused by their repeated misconduct, is not convincing.

Despite the unreasonably low number of hours proposed by Goodyear and its attorneys, the number of hours Plaintiffs have requested does appear high. Therefore, the Court has looked to the Code H objections with great care. But having examined the associated time entries, most of the Code H objections do not have merit. It is important to note that many of the Code H objections stem from billings directly connected to the sanctions proceedings. During that time, Plaintiffs' counsel was responding to the actions and filings by teams of lawyers representing Goodyear, Mr. Hancock, and Mr. Musnuff. Plaintiffs' counsel was also attempting to conduct discovery to further substantiate their misconduct claims. In light of the accelerated briefing and discovery deadlines during the sanctions proceedings, it is not surprising that Plaintiffs' counsel put in a great deal of work in a short time period. *See,*

e.g., time entries dated 4/17/12 to 4/26/12 (billing approximately nine hours per day).

Based on the Court's years-long familiarity with this case, the appropriate adjustments for excessive billing are set forth on Appendix C. If not referenced, the Code H objections are overruled.

ix. Code I Objections

Code I refers to fees for "recreating time entries and preparing the fee application." Because this case originally had no prospect of an attorneys' fee award, Plaintiffs' counsel did not have the normal incentive to keep contemporaneous time records. Thus, the need to recreate time entries was a direct result of the sanctionable conduct. Therefore, the time recreating Plaintiffs' time records will be allowed. Also, there is no reason to disallow the time Plaintiffs spent in litigating the fees issue. *See, e.g.*, *Camacho v. Bridgeport-Financial, Inc.*, 523 F.3d 973, 981 (9th Cir. 2008) ("[I]t would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee."). Thus, the Code I objections are overruled.

II. Conclusion

Based on the foregoing, the Court makes the following adjustments.

Objection	Standard Adjustment	Contingent Adjustment
Code A	$29,310 (20% of $146,550)	$29,310
Code B	0	0
Code C	$32,117 ($39,117-$7,000)	$32,117
Code D	$4,880.73 (unsupported costs)	$4,880.73
Code E	0	0
Code F	0	$722,406.52
Code G	$50,721 ($88,060.50 - $37,339.50)	$50,721
Code H	$25,827.50 ($90,927.50 - $65,100)	$25,827.50
Code I	0	0
TOTAL	$142,856.23	$865,262.75

Plaintiffs' starting figure of $2,884,057.39, reduced by the standard adjustment, results in a lodestar of $2,741,201.16 in attorneys' fees and costs. There is no reason to adjust this figure. *See Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 n.11 (9th Cir. 2012) ("After computing the 'lodestar,' the district court may then adjust the figure upward or downward taking into consideration twelve 'reasonableness' factors. . . ."). The Court previously determined 20% of the

award would be apportioned to Mr. Hancock while Mr. Musnuff and Goodyear would be responsible for 80%.

In the alternative, the starting figure of $2,884,057.39 reduced by the standard adjustment as well as the adjustment for harm not directly linked to the misconduct (Code F objections) results in a lodestar of $2,018,794.64. There is no reason to adjust this amount. *Id.* Therefore, if necessary, the Court would enter judgment, appropriately apportioned, in that amount.

Accordingly,

IT IS ORDERED the Clerk of Court is directed to enter judgment in favor Plaintiffs and against Graeme Hancock in the amount of $548,240.23 and against Basil J. Musnuff and the Goodyear Tire and Rubber Co. in the amount of $2,192,960.93.

DATED this 26th day of August, 2013.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States
District Judge

APPENDIX A

Date	Billed Amount	Hourly Rate	Original Total	Adjusted Hours	Adjusted Amount for Inadequate Description
11/8/2006	0.2	165	33	0	0
11/9/2006	2	500	1000	1	500
11/13/2006	0.2	500	100	0	0
11/15/2006	0.3	500	150	0	0
11/30/2006	1.4	500	700	0	0
12/4/2006	0.1	500	50	0	0
12/19/2006	1.2	500	600	0	0
1/3/2007	8.5	500	4250	4	2000
1/24/2007	0.2	500	100	0	0
1/28/2007	4.8	500	2400	0	0
1/29/2007	2	500	1000	0	0
5/15/2007	0.9	500	450	0	0
5/15/2007	0.3	500	150	0	0
5/19/2007	9.7	500	4850	4	2000
5/20/2007	10.1	500	5050	5	2500
5/29/2007	0.1	500	50	0	0
5/29/2007	0.2	500	100	0	0
6/1/2007	0.5	500	250	0	0
7/16/2007	0.2	500	100	0	0
7/17/2013	0.8	500	400	0	0
7/19/2007	0.3	500	150	0	0
8/1/2007	0.1	500	50	0	0
8/7/2007	0.1	500	50	0	0
8/14/2007	0.2	500	100	0	0
8/15/2007	2.8	500	1400	0	0
8/16/2007	0.1	500	50	0	0
9/17/2007	0.1	500	50	0	0
10/4/2007	.05	500	250	0	0
10/15/2007	0.2	500	100	0	0
10/15/2007	0.5	500	250	0	0
10/22/2007	0.8	500	400	0	0

10/25/2007	0.3	500	150	0	0
10/30/2007	0.5	500	250	0	0
11/5/2007	0.8	500	400	0	0
11/5/2007	0.2	500	100	0	0
11/6/2007	0.3	500	150	0	0
11/7/2007	0.1	500	50	0	0
11/7/2007	0.2	500	100	0	0
11/9/2007	0.5	500	250	0	0
11/13/2007	0.2	500	100	0	0
11/13/2007	0.2	500	100	0	0
11/16/2007	0.1	500	50	0	0
11/29/2007	0.3	500	150	0	0
12/6/2007	0.3	500	150	0	0
12/20/2007	0.1	500	50	0	0
12/20/2007	0.2	500	100	0	0
12/29/2007	0.2	500	100	0	0
12/29/2007	0.1	500	50	0	0
1/14/2008	4.2	500	2100	0	0
1/23/2008	0.2	500	100	0	0
2/29/2008	0.2	500	100	0	0
3/14/2008	0.1	500	50	0	0
3/25/2008	0.1	500	50	0	0
3/26/2008	0.1	500	50	0	0
3/26/2008	0.3	500	150	0	0
4/3/2008	0.3	500	150	0	0
4/4/2008	0.3	500	150	0	0
4/11/2008	0.1	500	50	0	0
4/14/2008	0.4	500	200	0	0
4/14/2008	0.1	500	50	0	0
4/23/2008	0.3	500	150	0	0
4/24/2008	0.2	500	100	0	0
6/13/2008	0.6	500	300	0	0
6/16/2008	0.6	500	300	0	0
6/17/2008	0.2	500	100	0	0

6/17/2008	0.5	500	250	0	0
6/19/2008	0.1	500	50	0	0
6/25/2008	0.2	500	100	0	0
6/26/2008	0.2	500	100	0	0
6/30/2008	0.9	500	450	0	0
7/17/2008	0.2	500	100	0	0
7/23/2008	0.2	500	100	0	0
8/3/2008	0.3	500	150	0	0
8/5/2008	0.2	500	100	0	0
8/11/2008	0.1	500	50	0	0
8/11/2008	0.4	500	200	0	0
8/12/2008	0.1	500	50	0	0
8/22/2008	0.4	500	200	0	0
8/23/2008	0.1	500	50	0	0
8/23/2008	0.1	500	50	0	0
8/26/2008	0.5	500	250	0	0
8/26/2008	0.1	500	50	0	0
8/26/2008	0.1	500	50	0	0
8/26/2008	0.2	500	100	0	0
8/27/2008	0.2	500	100	0	0
8/27/2008	0.8	500	400	0	0
8/28/2008	0.2	500	100	0	0
8/29/2008	0.5	500	250	0	0
8/29/2008	0.1	500	50	0	0
8/29/2008	0.3	500	150	0	0
9/7/2008	0.1	500	50	0	0
9/9/2008	1	500	500	0	0
9/12/2008	0.2	500	100	0	0
9/23/2008	0.3	500	150	0	0
10/5/2008	0.2	500	100	0	0
10/15/2008	0.2	500	100	0	0
10/20/2008	0.2	500	100	0	0
11/12/2008	0.4	500	200	0	0
11/20/2008	0.2	500	100	0	0

11/24/2008	0.1	500	50	0	0
1/2/2009	0.8	500	400	0	0
1/13/2009	0.1	500	50	0	0
3/2/2009	0.2	500	100	0	0
4/2/2009	0.2	500	100	0	0
4/7/2009	0.1	500	50	0	0
4/8/2009	0.1	500	50	0	0
6/24/2009	0.6	500	300	0	0
6/29/2009	0.5	500	250	0	0
7/8/2009	0.1	500	50	0	0
8/8/2009	0.3	500	150	0	0
3/25/2010	0.1	500	50	0	0
3/25/2010	0.1	500	50	0	0
3/21/2012	0.5	500	250	0	0
4/5/2012	0.1	500	50	0	0
3/6/2008	0.1	345	34.5	0	0
5/20/2008	0.1	345	34.5	0	0
3/13/2012	0.6	425	255	0	0
4/5/2012	0.3	425	127.5	0	0
4/16/2012	0.6	425	255	0	0
4/19/2012	0.6	425	255	0	0
4/29/2012	0.5	445	222.5	0	0
TOTALS	78.8		$39,117.00	14	$7,000.00

APPENDIX B

Date	Billed Amount	Hourly Rate	Original Total	Adjusted Hours	Adjusted Amount for Non-Clerical Work
11/6/2006	1.8	165	297	1.4	231
11/7/2006	0.2	165	33	0	0
11/17/2006	6.6	165	1089	4	660
11/22/2006	5.2	165	858	3.5	577.5
11/27/2006	7.3	165	1204.5	5	825
12/1/2006	4.4	165	726	3	495

12/7/2006	4.7	165	775.5	2	330
12/8/2006	0.8	165	132	0.4	66
12/11/2006	1.2	165	198	0.6	99
12/14/2006	1.1	165	181.5	0.6	99
12/15/2006	3.7	165	610.5	2	330
12/18/2006	7.2	165	1188	5	825
12/19/2006	4.3	165	709.5	2	330
1/3/2007	0.3	165	49.5	0	0
1/23/2007	2	165	330	0	0
1/30/2007	0.4	165	66	0	0
1/31/2007	3.9	165	643.5	0	0
2/1/2007	2.8	165	462	1	165
2/7/2007	3.1	165	511.5	1.5	247.5
2/8/2007	5.4	165	891	3	495
2/9/2007	3.3	165	544.5	1.5	247.5
2/12/2007	7.5	165	1237.5	3	495
2/13/2007	6.3	165	1039.5	3	495
2/27/2007	2.1	165	346.5	1.4	231
2/28/2007	2.5	165	412.5	1	165
3/1/2007	0.7	165	115.5	0	0
3/14/2007	2.3	165	379.5	0	0
3/15/2007	6	165	990	0	0
3/16/2007	5	165	825	2.5	412.5
3/27/2007	0.2	165	33	0	0
3/28/2007	1.4	165	231	0	0
4/4/2007	0.2	165	33	0	0
4/5/2007	0.3	165	49.5	0.1	16.5
4/6/2007	4.7	165	775.5	1.5	247.5
4/6/2007	0.3	165	49.5	0	0
4/7/2007	3.4	165	561	0	0
4/9/2007	1.9	165	313.5	0	0
4/10/2007	2.3	165	379.5	0.5	82.5
4/11/2007	0.2	165	33	0	0
4/12/2007	0.2	165	33	0	0

4/18/2007	0.3	165	49.5	0.2	33
4/18/2007	1.3	165	214.5	0.7	115.5
4/20/2007	0.3	165	49.5	0.1	16.5
4/23/2007	0.5	165	82.5	0.2	33
4/24/2007	0.3	165	49.5	0	0
4/26/2007	7.2	165	1188	7.1	1171.5
4/30/3007	0.2	165	33	0	0
4/30/2007	1.2	165	198	0.5	82.5
5/1/2007	0.1	165	16.5	0	0
5/2/2007	0.8	165	132	0.4	66
5/3/2007	0.9	165	148.5	0.5	82.5
5/4/2007	2.2	165	363	1	165
5/4/2007	2.7	165	445.5	2	330
5/7/2007	5.4	165	891	4	660
5/8/2007	6.3	165	1039.5	4	660
5/9/2007	6.8	165	1122	4	660
5/11/2007	3.3	165	544.5	1.5	247.5
5/14/2007	1.3	165	214.5	0.5	82.5
5/15/2007	6.4	165	1056	4	660
5/16/2007	1.6	165	264	0	0
5/18/2007	7.2	165	1188	3	495
5/20/2007	5.3	165	874.5	1	165
5/21/2007	1.5	165	247.5	0.2	33
5/23/2007	1.1	165	181.5	0	0
5/30/3007	7.5	165	1237.5	6	990
5/31/2007	5.9	165	973.5	3	495
6/1/2007	7.3	165	1204.5	1	165
6/6/2007	0.1	165	16.5	0	0
6/11/2007	7.2	165	1188	2	330
6/13/2007	8.2	165	1353	0	0
6/15/2007	7.3	165	1204.5	2	330
6/21/2007	7.6	165	1254	3	495
6/22/2007	8.1	165	1336.5	6	990
6/25/2007	6.8	165	1122	3	495

6/26/2007	3.4	165	561	3	495
6/27/2007	7.3	165	1204.5	2	330
6/28/2007	7.2	165	1188	5	825
7/2/2007	7.8	165	1287	4	660
7/3/2007	5.2	165	858	1	165
7/5/2007	7.5	165	1237.5	3	495
7/10/2007	1.2	165	198	0.5	82.5
7/24/2007	1.2	165	198	0	0
7/25/2007	0.7	165	115.5	0.2	33
7/26/2007	0.2	165	33	0	0
7/27/2007	2.7	165	445.5	0.7	115.5
7/30/2007	2.8	165	462	1	165
7/31/2007	3.9	165	643.5	0	0
8/1/2007	0.5	165	82.5	0.2	33
8/10/2007	0.5	165	82.5	0	0
8/10/2007	2.5	165	412.5	0.5	82.5
8/21/2007	1	165	165	0	0
8/22/2007	1.8	165	297	0.4	66
8/24/2007	0.5	165	82.5	0	0
8/28/2007	0.2	165	33	0	0
8/30/2007	6.8	165	1122	1.5	247.5
9/4/2007	0.9	165	148.5	0.2	33
9/5/2007	0.5	165	82.5	0	0
9/7/2007	1.2	165	198	0	0
9/9/2007	1.1	165	181.5	0	0
9/11/2007	5.8	165	957	2.5	412.5
9/18/2007	7	165	1155	2.5	412.5
9/19/2007	4.4	165	726	1.5	247.5
9/20/2007	3.8	165	627	1.2	198
9/21/2007	3.5	165	577.5	1.5	247.5
9/24/2007	4.8	165	792	1.5	247.5
9/27/2007	4.7	165	775.5	3	495
9/28/2007	6.1	165	1006.5	1	165
10/2/2007	3.7	165	610.5	1	165

10/5/2007	6.2	165	1023	2	330
10/9/2007	3.6	165	594	3	495
10/10/2007	5.8	165	957	4.5	742.5
10/11/2007	4.4	165	726	4	660
10/12/2007	7.7	165	1270.5	7	1155
10/15/2007	3.1	165	511.5	1.7	280.5
10/19/2007	0.7	165	115.5	0	0
10/22/2007	1.3	165	214.5	0	0
10/23/2007	2.8	165	462	1	165
10/24/2007	1.2	165	198	0.5	82.5
10/26/2007	1.2	165	198	0.6	99
11/18/2007	1.8	165	297	0	0
11/19/2007	0.8	165	132	0.5	82.5
11/21/2007	0.5	165	82.5	0	0
11/27/2007	1.4	165	231	0	0
11/28/2007	2.8	165	462	1.8	297
11/30/2007	0.3	165	49.5	0.1	16.5
11/30/2007	1.4	165	231	1	165
12/3/2007	1.6	165	264	0.5	82.5
12/4/2007	0.3	165	49.5	0	0
12/11/2007	1.4	165	231	0.4	66
12/12/1007	0.9	165	148.5	0.3	49.5
12/18/2007	1.3	165	214.5	0	0
12/20/2007	1.7	165	280.5	0.4	66
12/28/2007	0.7	165	115.5	0.5	82.5
1/4/2007 [sic]	4.1	165	676.5	0	0
1/7/2008	2.8	165	462	0	0
1/9/2008	0.8	165	132	0.1	16.5
1/15/2008	1	165	165	0.1	16.5
1/22/2008	1.7	165	280.5	0	0
1/24/2008	0.5	165	82.5	0	0
1/30/2008	0.8	165	132	0.1	16.5
2/12/2008	5.7	165	940.5	4	660
2/20/2008	4.2	165	693	3	495

2/25/2008	2.2	165	363	0	0
3/10/2008	3.8	165	627	0	0
3/13/2008	4	165	660	0	0
3/16/2008	4	165	660	3	495
3/19/2008	3.7	165	610.5	3	495
4/2/2008	3.7	165	610.5	3	495
4/3/2008	0.2	165	33	0	0
4/21/2008	4.7	165	775.5	3	495
4/22/2008	5.6	165	924	4	660
4/28/2008	2.8	165	462	2	330
5/1/2008	5.7	165	940.5	4	660
5/2/2008	1.7	165	280.5	1.5	247.5
5/5/2008	5.9	165	973.5	4	660
5/9/2008	5.5	165	907.5	2	330
5/12/2008	3.4	165	561	2	330
5/13/2008	6.7	165	1105.5	5	825
5/20/2008	4.8	165	792	0	0
5/21/2008	11.1	165	1831.5	0	0
5/27/2008	0.7	165	115.5	0	0
5/28/2007	1.9	165	313.5	1	165
5/29/2008	3.5	165	577.5	0	0
6/18/2008	0.5	165	82.5	0	0
7/16/2008	0.5	165	82.5	0	0
4/2/2010	0.8	165	132	0	0
4/8/2010	0.9	165	148.5	0	0
4/9/2010	1.4	165	231	0	0
4/10/2010	0.4	165	66	0.2	33
4/11/2010	0.4	165	66	0.2	33
4/12/2010	2.9	165	478.5	1	165
4/13/2010	2.8	165	462	1	165
4/14/2010	1.2	165	198	0	0
TOTALS	533.7		$88,060.50	226.3	$37,339.50

APPENDIX C					
Date	Billed Amount	Hourly Rate	Original Total	Adjusted Hours	Adjusted Amount for reasonableness
5/19/2007	9.7	500	4850	8	4000
5/20/2007	10.1	500	5050	8	4000
5/21/2007	12	500	6000	9	4500
9/18/2009	8	500	4000	6	3000
4/9/2010	8.5	500	4250	8	4000
4/13/2010	5	500	2500	2	1000
4/13/2010	7	500	3500	4	2000
3/16/2011	8.9	500	4450	8	4000
10/5/2011	7.8	500	3900	6	3000
10/5/2011	8.2	500	4100	6	3000
10/8/2011	8.1	500	4050	6	3000
10/9/2011	9.7	500	4850	6	3000
10/10/2011	10.1	500	5050	6	3000
3/12/2012	9.2	500	4600	8	4000
3/13/2012	8.6	500	4300	8	4000
3/21/2012	8.2	500	4100	4	2000
3/22/2012	11.2	425	4760	8	3400
5/30/2012	11.1	425	4717.5	8	3400
6/18/2012	9.8	425	4165	6	2550
6/20/2012	9.8	425	4165	6	2550
7/2/2012	6.8	425	2890	4	1700
11/8/2012	1.6	425	680	0	0
TOTALS	189.4		$90,927.50	135	$65,100.00

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al., Plaintiffs, vs. Goodyear Tire and Rubber Company, et al., Defendants.	No. CV-05-02046-PHX-ROS **JUDGMENT ON ATTORNEYS FEES** (Filed Aug. 26, 2013)

IT IS ORDERED AND ADJUDGED Pursuant to the Order filed August 26, 2013, judgment is entered in favor of Plaintiffs and against Graeme Hancock in the amount of $548,240.23 and against Basil J. Musnuff and the Goodyear Tire and Rubber Company in the amount of $2,192,960.93.

JUDGMENT ENTERED THIS 26th day August, 2013.

BRIAN D. KARTH
District Court Executive/Clerk

s/L. Dixon
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al., Plaintiffs, vs. Goodyear Tire and Rubber Co., et al., Defendants.	)	No. CV-05-02046-PHX-ROS **ORDER** (Filed Jun. 26, 2013)

On November 8, 2012, the Court sanctioned Graeme Hancock, Basil Musnuff, and Goodyear Tire and Rubber Co. ("Goodyear") based on repeated misconduct during discovery. The amount of sanctions was set as the "fees and costs incurred after Goodyear served its supplemental responses to Plaintiffs' First Request" for Production of Documents in September 2006. (Doc. 1073 at 64). Because the fees and costs were being awarded as a sanction, Local Rule 54.2 regarding attorneys' fees requests did not automatically apply. Out of an abundance of caution, however, and to give Mr. Hancock, Mr. Musnuff, and Goodyear an opportunity to object, the Court directed Plaintiffs to submit the documentation contemplated by Local Rule 54.2. Having reviewed that documentation, the Court issues the following order.

I. Background

The Court will not recount in detail the misconduct that served as the basis for sanctioning Mr. Hancock, Mr. Musnuff, and Goodyear. In short, sanctions were necessary because "Goodyear and its attorneys adopted a strategy . . . to resist all legitimate discovery, withhold *obviously* responsive documents, allow Plaintiffs and their experts to operate under erroneous facts, disclose small subsets of documents as late as possible" and otherwise attempt to frustrate the administration of justice. (Doc. 1073 at 65). The latest briefs from Goodyear and its attorneys contain a number of arguments that are, in effect, requests for the Court to reconsider its prior findings. There is no basis to revisit most of those arguments. The only argument worthy of additional discussion involves the alleged absence of a direct causal relationship between the misconduct and the fees and costs awarded by the Court.

Given the breadth of the misconduct in this case, it would be exceptionally difficult to link each instance of misconduct with the harm that misconduct caused. When attorneys make repeated misrepresentations in court, a 30(b)(6) witness repeatedly makes misrepresentations during his deposition, and expert witnesses are knowingly misled, a court must have some ability to provide relief. The Court previously concluded it would be appropriate to shift all the fees and costs incurred after it became clear that Goodyear and its attorneys were not acting in good faith. The Court recognizes, however, that Ninth Circuit authority might be read as limiting an award of sanctions to the

harm *directly* caused by the misconduct. *Miller v. City of Los Angeles*, 661 F.3d 1024 (9th Cir. 2011). Therefore, to prevent the need for future proceedings, the award of fees and costs will include an alternative amount of the fees and costs incurred as a direct result of sanctionable conduct.

Regardless of whether the Court awards *all* the fees and costs after September 2006 or only a much smaller subset, it now appears that an inordinately complicated accounting will be required. Therefore, the parties will be instructed to meet and confer in an attempt to agree regarding the appropriate size of the Court's award. If they are unable to agree, the Court will appoint a special master to conduct the accounting. The Court offers the following in hopes of guiding the parties' discussions.

II. Determining the Amount of Attorneys' Fees

The Court previously indicated it would utilize the lodestar method for calculating the amount of fees. (Doc. 1073 at 51 n.23). That method consists of "multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (quotation omitted). Once that calculation is made, the Court "may then adjust the figure upward or downward taking into consideration twelve reasonableness factors." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1033 n.11 (9th Cir. 2012) (quotation omitted).

A. Reasonable Hourly Rates

Plaintiffs seek the following hourly rates:

Individual	Hourly Rate
David L. Kurtz (attorney)	$500
Kerry Chrisman (paralegal)	$165
Michael O'Connor (attorney)	$445
John J. Egbert (attorney)	$425
Paul G. Johnson (attorney)	$365
Garrett Olexa (attorney)	$345
Peter Donovan (attorney)	$180
Michele Maser (paralegal)	$195
Mary Muchmore Hogue (paralegal)	$165
James Abernethy (attorney)	$400

Goodyear and its attorneys do not object to any of these hourly rates as unreasonable. Based on the evidence submitted by Plaintiffs, the Court finds these fees reflect the prevailing hourly rate in Phoenix for lawyers of reasonably comparable skill, experience, and reputation working on matters of this type. Therefore, any calculation of the lodestar will be based on these hourly rates.[1]

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[1] Goodyear and its attorneys objected that these rates might not have been the prevailing rate at the time the services were

B. Hours Reasonably Expended

According to the time records submitted by Plaintiffs' counsel, lead counsel David Kurtz spent approximately 3,700 hours on this case during the relevant time while a paralegal at his firm spent approximately 1,000 hours. The attorneys and paralegals at Jennings, Strouss & Salmon, P.L.C. spent approximately 1,200 hours. And attorney James Abernethy spent approximately 120 hours. Goodyear and its attorneys object to these figures, claiming the absolute maximum the Court could find reasonable is approximately 800 hours by Mr. Kurtz and his paralegal, a little over 500 hours from all the staff at Jennings, Strouss & Salmon, and no hours from Mr. Abernethy.

The difference between the parties' calculations for the reasonable amount of time spent on this litigation is approximately 4,600 hours. Based on the Court's familiarity with the case, and its participation throughout the litigation, the hours submitted by Plaintiffs appear more reasonable than those proposed by Goodyear and its attorneys. But the Court is not yet prepared to definitively resolve the reasonable number of hours. Instead, the parties will be instructed to attempt to reach settlement on two figures. First, the reasonable number of hours incurred after September 2006. Second, the reasonable number of hours directly attributable to the sanctionable conduct identified in

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performed. But this objection is foreclosed by Supreme Court authority. *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989) (allowing for application of current rates).

the sanctions order. If the parties are able to reach agreement on these two figures, the Court will adopt the parties' agreement, awarding the higher figure but also deeming the lower figure an appropriate alternative in the event the sanctions must be so limited.

If the parties are unable to reach agreement on the number of hours reasonably expended, the appointment of a special master appears appropriate. Fed. R. Civ. P. 53. That special master would be tasked with preparing a report on the appropriate lodestar regarding attorneys' fees. *See, e.g.*, *Agostino v. Quest Diagnostics, Inc.*, 2012 WL 2344865 (D.N.J. June 20, 2012) (appointing special master to prepare report on attorneys' fees dispute). At present, the Court is inclined to require the parties split the cost of a special master equally but the special master would be instructed to submit a recommendation regarding the final allocation of the costs associated with his or her service.

Pursuant to Federal Rule of Civil Procedure 53, the Court can appoint a master only after giving "the parties notice and an opportunity to be heard." Fed. R. Civ. P. 53(b)(1). Therefore, if the parties cannot reach an agreement on the amount of attorneys' fees, the parties will be ordered to file a joint statement setting forth their position on the following issues: whether appointment of a special master is warranted; how the costs of the special master should be allocated; and the names of three agreed upon individuals qualified to serve. Each interested party will be allowed three pages.

III. Determining Appropriate Costs' [sic]

As with the amount of attorneys' fees, the parties also present very different views regarding the appropriate amount of costs to award. Goodyear and its attorneys argue that the Court should award only those costs that qualify as "taxable" under 28 U.S.C. § 1920. It is unclear why Goodyear and its attorneys believe the award of costs must be so limited. And the award cannot be so limited.

The Ninth Circuit has "repeatedly . . . allowed prevailing plaintiffs to recover nontaxable costs where statutes authorize attorney's fees awards to prevailing parties."[2] *Grove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 580 (9th Cir. 2010). In the specific context of sanctions, the Supreme Court has held a court may award "the entire amount of . . . litigation costs paid to . . . attorneys." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 40 (1991). Therefore, there is no bar to awarding Plaintiffs their taxable and non-taxable costs.

Again, the parties will be instructed to attempt to agree regarding costs. As with the attorneys' fees, there should be an attempt to agree on the costs incurred after September 2006 as well as the costs incurred as a result of the sanctionable conduct. If they cannot

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[2] The prevailing practice in Phoenix is to bill costs separate from an attorneys' [sic] hourly rate. *Agster v. Maricopa County*, 486 F. Supp. 2d 1005, 1022 (D. Ariz. 2007).

agree, the special master will be tasked with conducting an accounting.[3]

IV. Motions for Clarification

There are two pending requests for clarification. First, Goodyear seeks clarification that the additional information submitted by Spartan Motors, Inc. (Doc. 1083) will not be addressed at this time because of the pending appeal. The additional evidence is a motion for reconsideration regarding the portion of the sanctions order addressed to Spartan's request for sanctions against Goodyear. Because the sanctions order regarding Goodyear is currently on appeal, the Court will not address Spartan's additional evidence at this time.

The second request for clarification comes from Plaintiffs. In the sanctions order, the Court apportioned twenty percent of the fees and costs to Mr. Hancock and the remaining eighty percent to Mr. Musnuff and Goodyear. (Doc. 1073 at 64). Plaintiffs now seek clarification on whether the Court intended to impose joint and several liability on Mr. Hancock, Mr. Musnuff, and Goodyear. Goodyear and its attorneys object to the Court addressing this issue given that Goodyear's appeal is pending. Out of an abundance of caution, the Court will defer ruling on this issue until the Ninth Circuit issues the mandate.

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[3] David Kurtz admits he was unable to locate supporting documents for eleven cost items, totaling $4,880.73 (Doc. 1112-1 at 8-9). Those costs will not be awarded.

V. Attorney Client Privilege

During the sanctions proceedings, Goodyear and its attorneys attempted to justify their behavior by disclosing certain information that might have been subject to the attorney-client privilege. Given that context, the disclosures will be considered a waiver of the privilege. *See Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield.").

Accordingly,

IT IS ORDERED the Motion for Attorney Fees and Costs (**Doc. 1082**) is **GRANTED IN PART** as set forth above.

IT IS FURTHER ORDERED no later than July 19, 2013 the interested parties shall meet and confer regarding the appropriate amount of attorneys' fees and costs. If they are able to reach agreement, no later than July 22, 2013 the parties shall file a joint statement identifying the appropriate amount of attorneys' fees and costs incurred after September 2006 as well as the attorneys' fees and costs incurred as a direct result of the sanctionable conduct.

IT IS FURTHER ORDERED if the parties cannot agree on the appropriate amount of attorneys' fees and costs, no later than July 26, 2013 they shall file a joint statement of no more than three pages per party with each party setting forth: whether appointment of a special master is warranted and how the costs of the

special master should be allocated. The parties should also jointly identify three individuals qualified to serve.

IT IS FURTHER ORDERED the Motion for Clarification (**Doc. 1089**) is **GRANTED**.

IT IS FURTHER ORDERED the Motion for Clarification (**Doc. 1114**) is **DENIED WITHOUT PREJUDICE**. Plaintiffs should renew their request, if appropriate, within ten days of the mandate being issued.

DATED this 26th day of June, 2013.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al., Plaintiffs, vs. Goodyear Tire and Rubber Co., et al., Defendants.	No. CV-05-02046-PHX-ROS **ORDER** (Filed Nov. 8, 2012)

Litigation is not a game. It is the time-honored method of seeking the truth, finding the truth, and doing justice. When a corporation and its counsel refuse to produce directly relevant information an opposing party is entitled to receive, they have abandoned these basic principles in favor of their own interests.[1] The little voice in every attorney's conscience that murmurs *turn over all material information* was ignored.

Based on a review of the entire record, the Court concludes there is clear and convincing evidence that sanctions are required to be imposed against Mr. Hancock, Mr. Musnuff, and Goodyear. The Court is aware of the unfortunate professional consequences that may flow from this Order. Those consequences, however, are a direct result of repeated, deliberate decisions by Mr. Hancock, Mr. Musnuff, and Goodyear to delay the production of relevant information, make misleading

[1] *See Nix v. Whiteside*, 475 U.S. 157, 166 (1986) (lawyer's "duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth").

and false in-court statements, and conceal relevant documents. Mr. Hancock, Mr. Musnuff, and Goodyear will surely be disappointed, but they cannot be surprised.

FINDINGS OF FACT

I. The Accident

In June 2003, Leroy and Donna Haeger, along with Barry and Suzanne Haeger (collectively "the Haegers"), were traveling in a motor home owned by Leroy and Donna. It was manufactured by Gulf Stream Coach ("Gulf Stream") on a chassis manufactured by Spartan Motors, Inc. ("Spartan"). The motor home had "G159" tires manufactured by Goodyear Tire and Rubber Company ("Goodyear"). While traveling on the highway, one of the motor home's front tires failed, followed immediately by the motor home leaving the road and tipping over.[2] The Haegers suffered serious injuries as a result. The motor home was insured by Farmers Insurance Company ("Farmers").

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[2] The cause of the accident was never definitively determined. Goodyear claimed the tire failed due to a previous impact which had severely damaged the tire and the accident was a result of driver error after that failure. The Haegers claimed there had been no impact, the tire failed because it was defective, and the accident was unavoidable.

II. Initial Proceedings

In 2005, the Haegers and Farmers sued Gulf Stream, Spartan, and Goodyear. The Haegers and Farmers alleged various product liability and negligence claims, including a claim that G159 tires were defective if used on motor homes. (Doc. 13). The Haegers were represented by David Kurtz. Goodyear was represented by Graeme Hancock of Fennemore Craig PC and Basil Musnuff of Roetzel & Andress in Akron, Ohio. Because Goodyear was being sued throughout the country based on alleged defects in the same G159 tire, it had appointed Mr. Musnuff as "national coordinating counsel" on all G159 cases. (Doc. 1014 at 93). In that role, Mr. Musnuff was responsible for reviewing discovery requests, coordinating the search for documents, and drafting responses. (Doc. 1014 at 124-25). Mr. Musnuff worked directly with Goodyear's in-house counsel Deborah Okey.[3]

On December 15, 2005, Goodyear served its Initial Disclosure Statement. (Doc. 992-1 at 20). According to that statement, "Plaintiffs' allegations with regard to the subject tire [were] unclear." (Doc. 992-1 at 23). Based on the alleged uncertainty, Goodyear's disclosure statement contained no meaningful information. In fact, it appears Goodyear's disclosure statement largely referenced witnesses and documents previously provided to Goodyear by Plaintiffs. Mr. Kurtz

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[3] There were other attorneys involved in representing Goodyear, but the parties agree these were the attorneys responsible for Goodyear's behavior during this case.

was not satisfied with Goodyear's initial disclosure and he wrote to Mr. Hancock and asked that Goodyear "take a more reflective look at your disclosure statement and comply with both the spirit and intent of the rule." (Doc. 992-1 at 27). In particular, Mr. Kurtz asked Goodyear to provide more meaningful disclosures regarding individuals who might have relevant information regarding the tire. Mr. Kurtz also asked Goodyear to produce "[t]esting documentation regarding the G159 tires." (Doc. 992-1 at 29). Goodyear did not supplement its initial disclosure in any relevant way.

III. Plaintiffs' Responses to Interrogatories

On August 18, 2006, Plaintiffs responded to a set of interrogatories from Goodyear.[4] Goodyear's interrogatory number 5 asked for "each legal theory under which you believe Goodyear is liable." (Doc. 963-1 at 19). In response, Plaintiffs stated it had been inappropriate to market the G159 tire for use on motor homes. According to Plaintiffs: "Prolonged heat causes degradation of the tire which, under appropriate circumstances, can lead to tire failure and tread separation even when the tire is properly inflated." (Doc. 963-1 at 20). Because the G159 was originally designed "for pick-up and delivery trucks," Plaintiffs claimed using the tire on motor homes meant it was "operating at

[4] There was a significant delay early in the case while the parties briefed, and the Court decided, whether to transfer the case to New Mexico. (Doc. 40).

maximum loads and at maximum speeds, producing *heat* and degradation to which the tire was not designed to endure, leading to its premature failure." (Doc. 963-1 at 20) (emphasis added). Accordingly, as of approximately August 18, 2006, Goodyear and its counsel knew Plaintiffs' liability theory and that heat would be a central issue in this case.[5]

IV. First Discovery Dispute and Protective Order

In August 2006, the parties filed their first notice of a discovery dispute. (Doc. 49). That disagreement centered on the terms of a protective order. The parties could not agree on how material designated "confidential" should be handled and on whether the protective order should include a provision allowing Mr. Kurtz to "share" information with other counsel litigating G159 claims against Goodyear elsewhere in the country. (Doc. 49). On August 22, 2006, the Court held a scheduling conference and also addressed the pending disagreements.

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[5] In an email from Mr. Hancock to Mr. Musnuff dated October 18, 2006, Mr. Hancock explained Plaintiffs' theories in some detail. (Plaintiffs' Statement of Fact in Support of Supplemental Brief ("PSOF") Ex. 4). And in an email from Mr. Musnuff to Ms. Okey dated November 9, 2006, Mr. Musnuff discussed the "new theory of liability in *Haeger*." (PSOF Ex. 5). Therefore, the repeated representations by Goodyear and its counsel that Plaintiffs did not state the legal theory of their case until January 7, 2007 is incorrect, contradicted by their own statements, and now appears to have been part of a general strategy to obstruct and delay discovery. (Doc. 983 at 4).

At the conference, Plaintiffs were represented by David Kurtz and Goodyear was represented by Mr. Hancock. When asked to explain the parties' disputes, Mr. Kurtz began by stating he was concerned Goodyear would abuse the provision allowing for documents to be designated "confidential." In effect, Mr. Kurtz wanted the protective order to contain a provision that would allow Goodyear's counsel located elsewhere to designate documents as "confidential." Local counsel, however, would be required to make "a reasonable inquiry to verify that in fact those confidentiality designations have been thoughtfully made by appropriate people." (Doc. 53 at 8). The Court rejected Mr. Kurtz's request and stated local counsel would not have to personally verify all "confidential" designations. But the Court also observed that local counsel remained "responsible for anything that's filed in this court . . . [and] they have a good-faith obligation to the Court and they are officers of the Court." (Doc. 53 at 8).

As for the sharing provision, Plaintiffs argued it was necessary to ensure that all parties litigating cases against Goodyear would receive "the appropriate and complete data in similarly situated cases." (Doc. 53 at 10). The Court rejected this request, emphasizing that "every officer before this Court has an obligation to provide all relevant discovery." (Doc. 53 at 10). The Court observed that the Federal Rules already provide "that anything that is relevant must be turned over to counsel and to all the parties," so there was no need for the sharing provision. Therefore, as of August 2006 all

counsel were expressly aware of the Court's expectations regarding discovery. The Court signed the scheduling order and the parties began discovery in earnest.

V. Plaintiffs' First Request for Production of Documents

In September 2006, Plaintiffs served Goodyear with their First Request for Production of Documents ("First Request"). (Doc. 59). Approximately thirty days later, Goodyear provided its responses. As later explained by Mr. Musnuff, in preparing discovery responses Mr. Musnuff would draft the responses, send them to Ms. Okey for approval, and after Ms. Okey approved them, they would be sent to local counsel for filing and service. (Doc. 1014 at 65-66). While Mr. Musnuff was tasked with drafting responses, Ms. Okey was always the final decision maker regarding discovery responses. (Doc. 1014 at 67).

The initial responses drafted by Mr. Musnuff, approved by Ms. Okey, and signed by local counsel consisted of sixteen "general objections" and then specific objections to each request which largely referenced the general objections. (Doc. 938-1 at 19). For example, Plaintiffs' Request for Production No. 14 sought: "All test records for the G159 tires, including, but no[t] limited to, road tests, wheel tests, high speed testing, and durability testing." (Doc. 938-1 at 24). Goodyear's response was:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons

> and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.

The record does not reflect any communications between Plaintiffs and Goodyear until Goodyear provided supplemental responses on November 1, 2006. (Doc. 62, 63). Most relevant here is Goodyear's supplemental response to the same "Request for Production No. 14." The supplemental response was:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.
>
> SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation, Goodyear will produce, subject to the Protective Order entered in this case, the DOT test data for the Subject Tire for the Subject Time Frame.

(Doc. 948-1 at 54).

The sequence of events following Goodyear's supplemental responses is intensely disputed. On December 5, 2006, Mr. Kurtz and Mr. Hancock spoke on the

phone. That conversation was about the difficulties the parties were having regarding discovery. According to a memorandum to the file Mr. Hancock prepared, during the call:

> I explained to [Mr. Kurtz] that the 'testing' universe he had asked for was overly broad and included all kinds of tests done on component parts or on design criteria that had nothing to do with anything we had seen involving this case. I anticipate [Mr. Kurtz] will send us a revision that asks for testing that has to do with high speed.

(Doc. 1032-2 at 51). On the particular issue of Request for Production No. 14, the memorandum stated Mr. Kurtz "agreed to be more specific about what kinds of tests he was looking for." (Doc. 1032-2 at 53). Mr. Kurtz has submitted an affidavit disputing Mr. Hancock's interpretation of that phone call. According to Mr. Kurtz, he "never withdrew or otherwise narrowed the scope of [the] original discovery requests." (Doc. 992-1 at 40). Mr. Kurtz states he "had no phone conversation with Mr. Hancock in December" where he made such an agreement. In short, according to Mr. Kurtz: "Nothing like [the events described by Mr. Hancock] ever occurred." (Doc. 992-1 at 40). The Court need not decide whose recollection of the December 5, 2006 phone call is accurate. Any question of whether there was an understanding evaporated after a letter from Mr. Kurtz to Mr. Hancock.

On December 20, 2006, Mr. Kurtz sent Mr. Hancock a letter. That letter was meant as "a follow up of

our recent discussions regarding discovery disputes." (Doc. 1044-2 at 17). The letter is lengthy and goes through numerous discovery disputes the parties were having. Most relevant here is the portion of the letter devoted to Request for Production No. 14. The letter states:

> *Request for Production No. 14.* We asked for test records for the G159 275/70R 22.5, including road tests, wheel tests, high speed testing, and durability testing. You objected, suggesting the test records were overly broad and unduly burdensome. You have only produced the DOT test data showing the tires were tested at 30 mph. My interest is in finding the rest of the test data. If there is any, it is your obligation to disclose it.

(Doc. 1044-2 at 25).

After receiving this letter, Mr. Hancock wrote an email to Mr. Musnuff. That email opened by stating: "We should either respond to any portions of Kurtz' 12.20 letter or figure out that we have a fight on our hands on these points and prepare a counter argument." (PSOF Ex. 7). The email goes through the entirety of Mr. Kurtz' letter but contains a specific reference to the Request for Production No. 14 and asks for guidance from Mr. Musnuff:

> RTP 14. Test records for all testing on this size G159 tire. Again, was the only testing at 30 mph or less? What speed testing/fleet testing did Goodyear rely on? Can/should we supplement since his theory is that this tire can't

> operate at 75 mph in the southwest for long periods?

(PSOF Ex. 7). The record does not contain Mr. Musnuff's response to this email.

Based on this evidence, the December 5, 2006 phone call may have led to confusion on Mr. Hancock's part whether the Request for Production No. 14 remained in place. But Mr. Kurtz's December 20, 2006 letter cleared up any possible confusion. Upon receiving that letter, Mr. Hancock undoubtedly knew Plaintiffs' Request for Production No. 14 had not been withdrawn or narrowed. In particular, this is evidenced by Mr. Hancock's email to Mr. Musnuff stating Goodyear needed to "figure out if we have a fight on our hands." Mr. Hancock could not have simultaneously believed that Mr. Kurtz withdrew the request but also that Goodyear might have "a fight on [its] hands." Moreover, Mr. Hancock explicitly acknowledged that Mr. Kurtz continued to request "[t]est records for **all** testing." (Emphasis added). Mr. Hancock's email establishes Mr. Musnuff knew about Mr. Kurtz's letter and that Mr. Musnuff knew Plaintiffs' Request for Production No. 14 was still active.

For simplicity and clarity, as of December 20, 2006 Mr. Hancock and Mr. Musnuff *knew* there was an outstanding request for: "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." Any suggestion by Mr. Hancock and Mr. Musnuff

that Mr. Kurtz had withdrawn his First Request is belied by the evidence of what they knew in December 2006. In addition, the position later advanced by Goodyear that it was relieved of any further obligation to respond to the First Request because it had lodged objections cannot be taken seriously. Mr. Hancock's email establishes Goodyear's counsel did not believe Mr. Kurtz needed to seek relief from the Court to obtain any further information from Goodyear. And finally, as of January 2, 2007, the date of Mr. Hancock's email, Mr. Musnuff *knew* the theory of Plaintiffs' case, and *knew* the request for additional test data was outstanding, but he neglected to even begin a search for responsive documents.

VI. Goodyear Discovers High Speed Testing

On January 5, 2007, Plaintiffs disclosed their expert witnesses. (Doc. 103). One of Plaintiffs' experts was David Osborne. Mr. Osborne's expert report identified the speed at which the tire was operated as a contributing factor to its failure. Mr. Hancock and Mr. Musnuff exchanged emails after reviewing Mr. Osborne's report. Mr. Musnuff wrote to Mr. Hancock:

> Osborne appears to draw the conclusion that the subject tire was only tested at speeds up to 30 mph from the fact that the only test data we produced is the DOT test data. Of course, our discovery response was limited to DOT test data because plaintiff had not yet identified their defect theory at that time. Now that plaintiffs are pinpointing speed as an issue,

> perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds. Thoughts?

(PSOF Ex. 8). Mr. Hancock responded: "Yes, we should produce the testing that shows this tire was capable of prolonged speed use and was built for the rated load and had a wide safety margin." (PSOF Ex. 8).

On January 11, 2007, Mr. Musnuff emailed Ms. Okey to give her a copy of Mr. Osborne's report. That email contained the same paragraph Mr. Musnuff sent to Mr. Hancock and concluded that "we should consider supplementing our discovery responses to show the testing of this tire at various higher speeds." (PSOF Ex. 9). Therefore, as of January 11, 2007, Mr. Hancock, Mr. Musnuff, and Ms. Okey were aware Plaintiffs had "pinpoint[ed] speed as an issue" and that Goodyear needed to "consider supplementing" its prior discovery responses. The record does not contain any indication whether Mr. Hancock, Mr. Musnuff, or Ms. Okey had further conversations on this point. The record is clear, however, that no supplementation ever occurred.

Around this same time, Mr. Musnuff was working with Sherman Taylor, a Goodyear tire engineer, "to locate documents and test data regarding the G159 Tire."[6] (Doc. 984-1 at 9). Based on receipt of Mr. Osborne's opinion, Mr. Musnuff asked Mr. Taylor "to locate the test data that the Radial/Medium Truck Tire

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[6] It was only after receiving the expert report that Mr. Musnuff began looking for any test results. (Doc. 1014 at 86-87).

Development Group used to release the G159 Tire for use at highway speeds." (Doc. 984-1 at 10). Mr. Taylor was not able to find "electronic or paper copies of the actual W84 high speed test data Goodyear used to release the G159 Tire for production." (Doc. 984-1 at 10). But on January 24, 2007, Mr. Taylor located "electronic post-production W84 high speed test data ("High Speed Tests") on the G159 Tire." (Doc. 984-1 at 11). When he discovered that data, Mr. Taylor also "discovered L04 heat rise test results ("Heat Rise tests") for the G159 Tire in the same electronic database." (Doc. 984-1 at 11). Mr. Taylor had another "employee pull the test results data into text files, which [he] then printed." (Doc. 984-1 at 11). According to Mr. Taylor, "[w]ithin a day or two of printing the test data, I delivered a copy to Mr. Musnuff." (Doc. 984-1 at 11). Mr. Taylor's statement refers to both the High Speed tests and the Heat Rise tests. Thus, according to Mr. Taylor, no later than early February 2007, Mr. Musnuff had actual copies of the High Speed and Heat Rise tests, not merely some knowledge that the tests had been conducted.

On February 12, 2007, Mr. Musnuff emailed Mr. Hancock a memo with a summary of the High Speed tests attached. (PSOF Ex 12). According to the memo, "Goodyear did test the [G159] at speeds greater than the 30 mph standard" as reflected in the High Speed tests. (PSOF Ex. 12). Based on that testing, the "tire was capable of being rated as a 75 mph tire."[7] (PSOF

[7] Interestingly, Mr. Musnuff notes that the G159 underwent a "significant design change" shortly before the "Haeger accident

Ex 12). That same day, Mr. Musnuff emailed Mr. Taylor and asked about the "list of High Speed Test Results" Mr. Taylor had given to him. Mr. Musnuff asked whether the ten "High Speed Test Results" Mr. Taylor had provided represented "ALL occasions on which the subject tire was subjected to [the] High Speed Test." (PSOF Ex. 15). Mr. Taylor responded there were "66 [High Speed] test[s] performed between 1996 & 2002." Mr. Musnuff then asked Mr. Taylor to gather that additional data because "if we disclose any of the [High Speed] testing – which is in our best interest – then we need to produce all of it." (PSOF Ex. 15).

On February 19, 2007, Mr. Hancock emailed Mr. Musnuff to discuss the "Schedule for Haeger." (PSOF Ex. 16). That email stated:

> We need to gather and produce documents re high speed testing as soon as reasonably practicable. No deadline, but we want to produce them promptly, given the accusation of no

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tire" was manufactured. That change "was a revision to the tread compound that allowed this tire to withstand the heat of high speed operation. The tire already was sufficient to be rated at 75 mph, but this revision would have improved its performance at high speed even more." (PSOF Ex. 12). Clearly, as of February 2007, Mr. Musnuff understood there was a relationship between a particular compound, the heat produced in high speed applications, and the G159's durability. Simply, Mr. Musnuff knew that the specific compound used in a tire relates to that tire's durability. Thus, his later attempted explanations that the Heat Rise test was merely a compounders' test with no bearing on durability is not believable.

> high speed testing in the January report that put that at issue in the case.

(PSOF Ex. 16). Therefore, no later than February 19, 2007, Mr. Hancock, Mr. Musnuff, and numerous Goodyear employees knew the High Speed tests needed to be produced. Even assuming Mr. Musnuff decided to wait for Mr. Taylor to search for and locate additional test results, there is no acceptable explanation, or one even offered, why Mr. Musnuff did not produce the results he had at that time. While the record establishes Mr. Musnuff and Mr. Hancock both believed the High Speed tests needed to be produced, there is no indication which discovery request Mr. Musnuff and Mr. Hancock believed the tests were responsive to. But given that Plaintiffs had not yet propounded their Third Request for Production of Documents, Mr. Musnuff and Mr. Hancock could not have believed the High Speed tests were responsive only to that later request. Finally, as of February 19, 2007, Mr. Hancock knew that Plaintiffs' expert was relying on the alleged lack of high speed testing.

VII. Statements Made After Learning High Speed Tests Existed

On April 6, 2007, approximately two months after Mr. Hancock knew the High Speed tests existed, the Court held a status conference. (Doc. 146). During that conference, the Court inquired whether the parties were on schedule to complete discovery by the applicable deadline. Plaintiffs' counsel stated he was on

schedule. The Court then asked Mr. Hancock for his opinion on whether all discovery could be completed on time.

> The Court: Let me ask defense counsel, is there any internal documentation that is available that has been requested that your client has – clients have not provided?
>
> Mr. Hancock: Your Honor, speaking on behalf of Goodyear, we have responded to all outstanding discovery and those responses have been outstanding for some time and, you know, if a document shows up, we'll of course produce it and supplement our answers but I think we're done or nearly done.
>
> The Court: And your client has provided certification as is required by the rule?
>
> Mr. Hancock: Correct.

(Doc. 146 at 12-13). These statements were false.

Mr. Hancock received notice of the existence of the High Speed tests on February 12, 2007 and sent an email on February 19, 2007 stating Goodyear "need[ed] to gather and produce" them "as soon as reasonably practicable." As of the April 6, 2007 status conference, the High Speed tests had not been disclosed, Mr. Hancock knew this, and his in-court statements at the April 6, 2007 were untruthful.

VIII. Third Request for Production of Documents

On May 8, 2007, Plaintiffs served their Third Request for Production of Documents ("Third Request"). Three of Plaintiffs' requests are relevant here: numbers 3, 4, and 10. Requests 3 and 4 sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." And Request 10 sought: "All documents which relate to the approval by Goodyear of the [G159] for 75 mph, including, but not limited to, all testing records relating to suitability of the subject tire for that speed." (Doc. 938-1 at 36). In an affidavit, Mr. Kurtz explained why he propounded the Third Request:

> My Third Request for Production utilized alternative language in a request for test records, which followed the language utilized in Goodyear's expert disclosures, which were received in my office in mid-April 2007. Mr. Olsen, Goodyear's in-house expert, specifically expressed his opinion that the G159 tire was designed for general highway use and designed to be operated at continuous highway speeds of 75 mph.

(Doc. 992-1 at 40-41). The Third Request for Production was not intended "to relieve Goodyear of any obligation to properly respond to Plaintiffs' First Request for Production of Documents and Interrogatories" nor was it intended to release Goodyear from "its obligations to timely supplement discovery responses." (Doc. 992-1 at 41). Before Goodyear responded to the Third

Request, the Court held a hearing on a separate discovery dispute.

At the discovery dispute hearing on May 17, 2007, the Court addressed a dispute involving Plaintiffs' attempts to obtain information from Gulf Stream and Spartan regarding other motor home accidents. During discussion of the dispute, Plaintiffs' counsel expressed his belief that this "tire was never tested above 30 miles an hour." (Doc. 201 at 48). Because of this statement, the Court asked a specific question of Goodyear's counsel and received an unequivocal response.

> The Court: Mr. Hancock, are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?
>
> Mr. Hancock: Yes, Your Honor.
>
> The Court: And they have been produced?
>
> Mr. Hancock: No, Your Honor. They have been requested from the plaintiffs in a Request for Production that arrived in my office I believe last week where the discovery response is due in mid-June. And they will be – I have requested them from my client and they will be produced at that time.
>
> The Court: All right. So Mr. Kurtz –
>
> Mr. Kurtz: Your Honor, if I may, we have, as have lawyers across the country, they have asked for these tests. My requests for these speed tests have been outstanding for well over a year and Mr. Hancock himself told me

the reason they haven't been produced is because nobody can find them anywhere.

The Court: Well, he's found them. He apparently has found them so you're going to have what you want.

Mr. Kurtz: Well, I'll be looking forward to reading them but that won't change the issue, Your Honor. You know, I think – you know, this is discovery, Judge. We ought to be able to ask some questions and I'm pleased to provide the court with a detailed factual record about these. These are not things that I'm making up. They are not things that experts divined. They are tied to hard documents prepared by Goodyear.

The Court: It seems to me that the issue has been narrowed after our lengthy conversation to the tests that have been used or were engaged in by Goodyear for the purpose of establishing for their purposes and for consumers that these tires could be used for – based upon the weight and pressure that they have indicated that they were or that they could hold for traveling above 75 or at 75 miles an hour.

Mr. Hancock: At and below Your Honor, thank you.

The Court: At and below. At no more than 75 miles an hour.

(Doc. 201 at 48-49). After further discussion with counsel regarding the appropriate scope of discovery and

depositions, the Court made sure Mr. Hancock understood his obligations.

> The Court: Is there any question in your mind, Mr. Hancock, what I am going to allow in terms of discovery? And that is the deposition questions that I will allow?
>
> Mr. Hancock: Your Honor, I believe the court is saying . . . my witnesses should be deposed about the [testing] done on this [specific] tire with respect to the speed in which it can be operated and what records they have, what records they don't have and what those records show?
>
> The Court: That's exactly right.
>
> Mr. Hancock: Thank you, Your Honor.

(Doc. 201 at 51). Mr. Hancock's statements were misleading.

As evidenced by the early February 2007 email traffic, Mr. Hancock knew about the High Speed tests and knew the tests needed to be produced. This was three months prior to Plaintiffs' Third Request. Thus, Mr. Hancock's in-court statement that the High Speed tests had only recently been requested in May 2007 was misleading and an apparent attempt to obscure the fact that Goodyear had been withholding the tests for approximately four months.

On May 21, 2007, Goodyear deposed Plaintiff's expert, Mr. Osborne. As Mr. Hancock and Mr. Musnuff knew, Mr. Osborne had opined that "no high speed

testing of the tire was done." (Doc. 983-1 at 5). As evidenced by their email traffic in early February 2007, Mr. Hancock and Mr. Musnuff both knew high speed testing existed, Plaintiffs' expert's report directly implicated that testing, and the testing needed to be produced. Mr. Hancock and Mr. Musnuff decided to withhold the High Speed tests for at least three months, and proceed with Mr. Osborne's deposition, knowing that Mr. Osborne was operating under incorrect assumptions and an incomplete record. The only plausible interpretation of this behavior is that Mr. Hancock and Mr. Musnuff decided to delay production of the tests in hopes of gaining a tactical advantage.

Still prior to production of the High Speed tests, the parties filed a notice of yet another discovery dispute. (Doc. 225). That notice recounted a variety of disputes, including a dispute involving Plaintiffs' request that Goodyear provide a 30(b)(6) witness.[8] At the discovery dispute hearing, Plaintiffs began by explaining the main theory of their case:

> Mr. Kurtz: And the tire can't carry the weight of the motor home at [freeway] speed. And it causes the tire to degrade and fail. And we believe – and we're in the middle of this in this case – that that is part of the reason that we saw all these motor home failures with the G159 tire, is that when they get up to freeway

[8] On May 11, 2007, Plaintiffs noticed a 30(b)(6) deposition of Goodyear. The subjects of that deposition were to include the "history of testing of the subject tire for speed capacity and weight capacity during the years of its production." (Doc. 175 at 4).

> speed, they're just not put together to operate in that environment.

(Doc. 243 at 13).

The parties then discussed with the Court the 30(b)(6) issue. Plaintiffs' counsel described the proposed deposition topics as including "the design history of this tire" and "testing for speed and weight." (Doc. 243 at 21). The Court ruled that the 30(b)(6) deposition could occur. (Doc. 243 at 27). The Court also clarified with Goodyear's counsel that the witness would be speaking on behalf of Goodyear. (Doc. 243 at 29).

On June 21, 2007, Goodyear responded to Plaintiffs' Third Request. The responses were provided to Ms. Okey for her explicit approval. (PSOF Ex. 19, 20). Goodyear's responses opened with the same or substantially similar boilerplate objections as those made in response to Plaintiffs' First Request. Goodyear then provided three identical responses to Plaintiffs' three requests for the "speed or endurance testing" Goodyear used to determine the G159 was suitable for use at 65 and 75 mph. That response was:

> Subject to and without waiving the following objections, and in a good faith spirit of cooperation, Goodyear states that it is producing, subject to the Protective Order entered into this case, copies of electronically-maintained high speed durability test results conducted on [G159] production tires since August 1996. After diligent search, to date Goodyear has not been able to locate additional paper

> records for the tests that are recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Also, after diligent search, to date Goodyear has not been able to locate the paper records for the high-speed durability tests which it conducted on the [G159] tire prior to August 1996, which were not recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Goodyear will supplement this Response to produce these paper records if they are subsequently located.
>
> Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome, seeks Irrelevant and Confidential Information.

(Doc. 938-1 at 36).

IX. Repeated Statements that Goodyear Withheld High Speed Tests

Around the same time Goodyear responded to Plaintiffs' Third Request, the Court ordered the parties to "confer and set dates for all remaining depositions and discovery." (Doc. 251). On June 26, 2007, Plaintiffs filed a document stating the parties had complied with the Court's Order by establishing dates to complete discovery. Because a status hearing was scheduled for the near future, Plaintiffs' filing also addressed various discovery problems they were still

having with Goodyear. According to Plaintiffs, Goodyear's June 21, 2007 disclosures were the "first time" it had disclosed "evidence which relates to the inability of the subject tire to operate at freeway speeds." Plaintiffs stated they were still waiting for Goodyear to produce additional testing information and they requested the Court "inquire and determine whether additional testing data is in Goodyear's possession to assure that Goodyear's disclosures are complete." (Doc. 256 at 3).

On June 28, 2007, Plaintiffs submitted a status report.[9] In that report, Plaintiffs stated:

> [T]he speed tests . . . were **finally produced last week** by Goodyear. They were originally requested in September of 200[6]. The documents had been in **Goodyear's possession since January 2007** but not disclosed until after Plaintiffs had disclosed their experts' opinions, including rebuttal opinions, and Plaintiffs' expert's deposition was taken.

(Doc. 260 at 2-3). A second status report from Plaintiffs submitted that same day referenced the High Speed tests and alleged: "All of the test data has been the subject of outstanding discovery requests since last September." (Doc. 262 at 2). These repeated statements reflect Plaintiffs' belief that their First Request remained in effect and that the High Speed tests were responsive to the First Request.

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[9] The docket does not reflect a status report from Goodyear.

On August 9, 2007, the parties filed a joint statement regarding a request to modify the scheduling order. In that document, Plaintiffs stated they were still attempting "to gather information from Goodyear on the design and testing of this tire." (Doc. 301 at 5). In addition, Plaintiffs claimed "Goodyear did not produce any testing on the speed of the tire until June [21], 2007,[10] despite the fact such testing was requested in Plaintiffs' First Request to Produce on September 20, 2006." (Doc. 301 at 6). In response, Goodyear argued Plaintiffs were attempting to "distract[] the Court with a series of red herrings regarding as yet unpresented and inchoate discovery disputes." (Doc. 301 at 7). Goodyear did not provide any substantive response regarding its late disclosure of testing data nor did Goodyear explain that its disclosure of the test data was timely based on Mr. Kurtz withdrawing his First Request in a phone conversation with Mr. Hancock in December 2006. Instead, Goodyear argued the discovery deadline had passed and requested the Court limit the amount of remaining discovery. Without addressing the testing data issue, the Court imposed new discovery deadlines. (Doc. 311).

On September 10, 2007, the parties submitted another joint statement of discovery dispute.[11] (Doc. 319). Plaintiffs were seeking to brief the issue regarding the

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[10] The document states June 24, 2007 but from other evidence in the record it appears Goodyear produced the testing on June 21, 2007.

[11] That document was not signed by an attorney for Goodyear.

"proper scope of discovery." Plaintiffs also wished to present "information that Goodyear improperly withheld high-speed test data from the court." (Doc. 319 at 2). On the issue of test data, Goodyear responded: "Nothing suggests this Court has ever ordered production of any test data to it." (Doc. 319 at 5). Goodyear also claimed it had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." This latter statement was misleading.

As of February 2007, Mr. Hancock and Mr. Musnuff knew the High Speed tests were responsive to Plaintiffs' First Request. The statement in the status report that the High Speed tests had been produced in a "timely response to Plaintiff's Third Request" was intended to mislead the Court into believing those tests had been requested *only* in the Third Request. That was plainly not true and contrary to Mr. Hancock and Mr. Musnuff's own knowledge as shown in their emails. Based in part on Goodyear's deception, the Court denied Plaintiffs' request to brief these issues and ordered the parties to comply with prior rulings regarding the appropriate scope of discovery. (Doc. 320).

X. Deposition of Goodyear's 30(b)(6) Witness

On September 12, 2007, Plaintiffs deposed Richard Olsen. Mr. Olsen had been designated as Goodyear's 30(b)(6) witness. Mr. Olsen was asked about the "high speed" tests Goodyear performed on the tire

prior to Goodyear determining it could be released as a tire able to perform at speeds up to 75 miles per hour. In particular, Mr. Olsen was given the four High Speed tests which had been turned over to Plaintiffs in June 2007 and was asked whether they constituted the entire universe of such tests.

> Mr. O'Connor (Plaintiffs' Counsel): To the best of your knowledge, [were] only these four high-speed tests available to Goodyear prior to rating this tire as a 75 mile an hour tire[?]
>
> * * *
>
> Mr. Olsen: No.
>
> Mr. O'Connor: What other high-speed tests are available?
>
> Mr. Olsen: I think we talked at length this morning when we first started getting into the high-speed test data that I've spoken with the people who were involved in the release of this tire, and they've confirmed to me that high-speed tests were run in the development process of this tire before it was released to production. We just don't have any paperwork available for that.
>
> Mr. O'Connor: Okay. So there were tests run, but those have either been discarded or thrown away, and we don't have the results of those tests. Correct?
>
> Mr. Olsen: We don't have them here today, but the people making the decision at that

time likely had them available to them at that time.

Mr. O'Connor: Okay. So they had them available, apparently, in 1998 and have somehow discarded them since 1998. Is that what you're trying to tell me?

Mr. Olsen: I'm just saying that they're not available today.

Mr. O'Connor: Okay. So based on the record we have, we only know of four available high-speed tests that we can look at as to whether or not Goodyear could justify speed rating this tire at 75 miles an hour in June of 1998. Correct?

Mr. Olsen: We have four available today to us.

* * *

Mr. O'Connor: **Okay. So there's any – any separate testing that would have been done on this car – on this particular tire, sir?**

Mr. Olsen: **There's a number of different test procedures that are run in the development process of a new tire before it goes into production.**

Mr. O'Connor: **Do we have any of those tests, sir?**

Mr. Olsen: **I don't have them, no.**

Mr. O'Connor: **Are they still available?**

Mr. Olsen: **I don't believe so.**

(Doc. 938-1 at 40-45) (emphasis added).

Mr. Hancock then asked Mr. Olsen some questions based on a document previously examined during the deposition. That document described the High Speed tests produced by Goodyear:

> Mr. Hancock: Okay. The – earlier on, the plaintiffs' counsel asked you about an exhibit . . . it is the test data for high-speed wheel tests performed on this tire. Do you have that?
>
> Mr. Olsen: Yes. . . .
>
> Mr. Hancock: . . . There are other numbered tests that are not on the exhibit. Is that correct? Do you recall the testimony the plaintiffs' counsel asked you about saying, "Well, we don't have tests, for example, 4 through 7," that sort of thing?
>
> Mr. Olsen: Yes, sir.
>
> Mr. Hancock: As far as you know, are all of the tests that were in the databases that were searched that were on the – this, the tire at issue in this case, this specification tire, in that database, in what you have there?
>
> Mr. Olsen: Yes. They're all included here.

(Doc. 938-1 at 40-47).

Based on Plaintiffs' dissatisfaction with Mr. Olsen's testimony, the parties submitted another joint

statement of discovery dispute. One of the disputes centered on Plaintiffs' belief that Mr. Olsen "was not sufficiently knowledgeable" on various topics. (Doc. 345 at 1). Plaintiffs also claimed that Goodyear had not produced "all high-speed testing on the G159 tire and has improperly redacted responsive G159 high speed test results." Goodyear claimed it had "produced all 'high speed testing' data more than three months ago." (Doc. 345 at 3). Goodyear also represented that it had not redacted any tests but it had "simply omitted tests with other tires not at issue in the case, which were *not* part of Plaintiffs' request for the high speed tests ('any speed or endurance testing to determine that the subject tire was suitable for 75 mph highway purposes')." (Doc. 345 at 3). The Court held a hearing on these disputes on October 19, 2007. (Doc. 361).

At that hearing, Mr. Hancock made a number of unequivocal statements. Mr. Hancock averred that "Goodyear has searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). After the Court learned Mr. Olsen may not have been qualified to state that all high speed testing data had been produced, the Court ordered Mr. Hancock to "ask [Mr. Olsen] just to make sure that . . . that everything that relates to the high-speed testing of this tire has been produced." Mr. Hancock responded: "I will do that, Your Honor. I will supplement our record. I believe that to be the case. I have checked with my client and

confirmed that that is the case."[12] (Doc. 361 at 46). Mr. Hancock then went on to "flesh out the record." He stated:

> Goodyear's normal document retention policy means we don't have those records anymore. These are not government-required tests. You don't keep them. . . . So there were tests done. Mr. Olsen can testify about those tests but **there are no documents for him to be questioned about other than the documents that have been produced** and we will supplement with direct confirmation of that.

(Doc. 361 at 47) (emphasis added). After a break, Mr. Hancock affirmed that Plaintiffs had asked for "documents which relate to any speed or endurance testing to determine that the subject tire was suitable for 65 miles per hour." (Doc. 361 at 53). Mr. Hancock affirmed yet again that Goodyear:

> has searched for and produced all of the high-speed testing on this tire. The original discovery request, which is how we got here, were all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced.

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[12] The record does not reflect whether Mr. Hancock asked Mr. Olsen about the High Speed tests but the record is clear that Mr. Hancock did not provide any additional test results after this discussion.

(Doc. 361 at 58-59). Mr. Hancock continued: "The discovery request is what did you rely on and tell the public that this tire could go 75 miles an hour? All of that testing has been produced. This tire goes out for sale and we produced all of the testing on any tire that was the same as any of the tires for sale." (Doc. 361 at 63).

All of these statements by Mr. Hancock were seriously misleading. Mr. Hancock knew, as evidenced by his February 2007 email to Mr. Musnuff, that the high speed tests were responsive to Plaintiff's First Request and they needed to be produced. By repeatedly relying on the tests being responsive only to the Third Request, Mr. Hancock was misleading the Court into thinking that Goodyear had been timely in producing the tests. But more importantly, Mr. Hancock repeatedly represented that there were *no other documents* beyond those already produced. As Mr. Olsen would inadvertently reveal later, Goodyear and its attorneys were concealing a wide variety of other testing documents.

XI. Post-Discovery Activity

Discovery formally ended shortly after the October 2007 hearing and the parties began briefing dispositive motions. The dispositive motions involved a wide array of complicated issues which, for purposes of this Order, are irrelevant. While those motions were pending, Plaintiffs agreed to dismiss Gulf Stream. (Doc. 635). Eventually, the Court issued a lengthy order denying Plaintiffs' motion for summary judgment

and denying in part and granting in part Goodyear's motion for summary judgment. (Doc. 651). The Court also granted Spartan's motion for summary judgment, dismissing Spartan from the case. (Doc. 652). Plaintiffs and Goodyear then prepared for trial by inundating the Court with motions in limine and other pretrial filings. The Court devoted substantial time and effort to resolving those motions. (Doc. 842, resolving over thirty motions). On April 14, 2010, the first day of trial, Plaintiffs and Goodyear informed the Court they had reached a settlement. (Doc. 926). As a result, the case was closed.

XII. Other G159 Cases

Having recounted the factual history of this case, the Court must very briefly outline certain events which occurred in other cases also involving G159 tires.[13] There were three other G159 cases of particular

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[13] Goodyear has been subject to a number of suits involving the G159 tire. According to a list provided by Plaintiffs, Goodyear was first sued regarding the G159 in 1999. (Doc. 938-1 at 83). Given this long history of litigation, it is surprising that Goodyear did not even begin to look for certain testing information until January 2007 when Mr. Musnuff made a request based on the *Haeger* case. Mr. Musnuff's internal correspondence hints, but does not establish, that he knew about other testing long before January 2007. In his January 11, 2007 email to Mr. Hancock, Mr. Musnuff states "perhaps we need to supplement our discovery responses to show the testing of this tire at various speeds." (PSOF Ex. 8). If Mr. Musnuff actually did not know any other tests existed, his email musing that "perhaps we need to supplement" is, to say the least, a strange way of phrasing the matter. But it is possible Mr. Musnuff's current claim that he first went looking

relevance here. Those cases involved actions by some combination of Mr. Hancock, Mr. Musnuff, and Goodyear. The three cases are *Woods v. Goodyear* in Alabama, *Schalmo v. Goodyear* in Florida, and *Bogaert v. Goodyear* in Maricopa County Superior Court. This Court cannot and would not issue sanctions based on actions taken in these other cases. But given that they bear directly on issues presented in this case, it is appropriate to look to them in some detail. *See, e.g., Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992) ("The totality of the circumstances [relevant to a request for sanctions] can include events which did not occur in the case proper but occurred in other cases and are, by their nature, relevant to the pending controversy."). In particular, these other cases are relevant when determining the credibility and state of mind of individuals involved in the present case.

A. *Woods v. Goodyear*

Woods v. Goodyear involved an accident with a Monaco Diplomat motor home and was filed in Alabama. (Doc. 938-1 at 84). Mr. Musnuff worked directly on the case in his role as national coordinating counsel. Sometime prior to July 2007, the *Woods* plaintiffs served on Goodyear their "Fifth Request for Production of Documents." That request sought, among other things: "All other testing conducted by Goodyear . . .

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for test data in January 2007 is true because Goodyear's obstructive discovery practices prior to 2006 were successful in keeping the additional testing concealed. (Doc. 1014 at 120).

that was undertaken, at least in part, to determine the suitability of [G159] tires to be driven at 65 mph." (Doc. 992-1 at 100). Goodyear's "Responses and Objections to Plaintiffs' Fifth Request for Production of Documents" were very similar to the responses served in *Haeger*. Those responses started out with sixteen general objections and then individual objections incorporating the general objections. Upon receiving Goodyear's responses, plaintiffs' counsel in *Woods* sent a letter asking Goodyear to "reconsider" its objections. Goodyear did not and the parties presented the issue to the court.

In late August 2007, the judge handling the *Woods* case resolved the discovery dispute. The court began by noting the case had "been pending for over 3 years and [had] been marked by disagreements over production of documents on first one issue then another." The court said it was "disgusted with the whole thing" and ordered Goodyear "to produce to the Plaintiff every document requested regarding the [G159] tire." (Doc. 992-1 at 127).

After receiving this order, Mr. Musnuff sent an email to numerous individuals at Goodyear explaining the judge had required Goodyear to "fully and completely respond to the Requests for Production." (PSOF Ex. 23). Mr. Musnuff included a "plan of action for responding to each RFP" and a "list of documents that need to be assembled for production in order to comply with the court's ruling." (PSOF Ex. 23). As recounted by Mr. Musnuff, the *Woods* plaintiffs' request number 7 sought:

> All other testing conducted by Goodyear of its [G159] tire that was undertaken, at least in part, to determine the suitability of such tires to be driven at 65 mph without an undue risk of tread or belt edge separations.

Mr. Musnuff included a comment regarding this request:

> We will need to produce documents regarding ALL types of testing of the [G159] tire. That is the unfortunate reality of the judge's decision. **We already have the high speed test data,** but we should go through the release checklist and identify all available testing data. We have already produced the W84 Test Protocol in other litigation. We have not previously produced the protocol set forth in the Master Specification, but we need to consider whether it serves our best interest to produce it.[14]

(PSOF Ex. 23, August 20, 2007 email) (emphasis added).

One week later, Goodyear employee Sherman Taylor responded by stating, "Below are the responses

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[14] Stating "we need to consider whether it serves our best interest to produce" an otherwise responsive document reflects precisely Goodyear's attitude toward its discovery obligations. Rather than conveying a concern that all responsive documents be produced, Mr. Musnuff's statement conveys that Goodyear's primary interest was to produce only those documents which would be in Goodyear's "best interest."

to [RFP] # 7." (PSOF Ex. 24). Mr. Taylor attached the following documents:

- DOT FMVSS-119 Extended Certification
- Heat Rise test;
- Bead durability test;
- Crown durability test;
- W16 test;
- W64 test;
- G09 test; and
- L04 test.

That email was sent to Mr. Musnuff and Goodyear engineer Jim Stroble. There is no record that Mr. Stroble subsequently clarified that Mr. Taylor's email was wrong. And, presumably relying on Mr. Taylor's opinion, Mr. Musnuff later supervised the production of the Heat Rise tests and the other tests listed.

The following point is critical and must be emphasized. As of August 27, 2007, Mr. Taylor and Mr. Musnuff knew that *all* of the tests listed in Mr. Taylor's email were responsive to a request for those tests which Goodyear conducted "to determine the suitability of [the G159] to be driven at 65 mph." This is in direct conflict with the position Mr. Musnuff and Goodyear adopted in the present case. According to Mr. Musnuff and Goodyear, their position in the present case was based on a belief that *only* the High Speed tests were responsive to Plaintiffs' request for: "All documents which relate to any speed or endurance

testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." Mr. Taylor's email shows Mr. Musnuff and Goodyear previously believed many other tests were responsive to such a request.

B. *Schalmo v. Goodyear*

Schalmo v. Goodyear involved an accident with a Fleetwood motor home and was filed in Florida. (Doc. 938-1 at 84). Again, Mr. Musnuff worked directly on the case in his role as national coordinating counsel. During discovery, the *Schalmo* plaintiffs' sought "all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc. 992-1 at 4). In April 2008, Goodyear responded to this request with a list of over twenty-five tests. Included in those tests were the Heat Rise tests. (Doc. 992-1 at 5).

Just as in the *Woods* matter, Goodyear's discovery response in *Schalmo* was an affirmative statement that the Heat Rise tests were responsive to a request for the testing Goodyear had used to determine the "appropriate speed rating, Load Range, and/or vehicle application of the G159 tires." As with *Woods*, the position taken in *Schalmo* is inconsistent with that taken in the present case. Rather than merely concede the response in the current case was inaccurate, Mr.

Musnuff and Goodyear now claim the response in *Schalmo* was inaccurate.[15]

According to Mr. Musnuff and Goodyear, when local counsel in *Schalmo* responded to the discovery request, he simply listed the same test data for each request for production, even though each of the tests listed was not responsive to each request.[16] As stated by Mr. Musnuff's current counsel, "the fact that the same lists were included with the responses to the first three discovery requests did not indicate that each listed test was responsive to each specific type of data requested." (Doc. 1000 at 3). Neither Goodyear nor Mr. Musnuff gives an acceptable explanation why, after being so precise in its discovery responses elsewhere, Goodyear suddenly decided to produce documents in this manner. Mr. Musnuff has attempted to explain that the *Schalmo* discovery response was complicated by Florida law and the need to submit certain documents for *in camera* review prior to production. That explanation is senseless. Even assuming Florida law requires extra procedures, there is no requirement in

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[15] This position also means Goodyear's document production in *Woods* was wrong.

[16] In fact, Mr. Musnuff goes further and states that some of the testing provided in *Schalmo* was not responsive to any of the requests. (Doc. 1000 at 9). It is strange and troubling that Mr. Musnuff expresses no concern that in a litigation he was supervising, discovery responses were served which allegedly provided clearly misleading lists of documents, including totally non-responsive documents.

Florida law that litigants provide grossly inaccurate discovery responses.

A final point regarding *Schalmo* involves Mr. Musnuff's admission that the Heat Rise tests were a type of "durability test." On May 8, 2009, Mr. Musnuff emailed Goodyear engineer Jim Stroble to discuss the Heat Rise tests. That email states "plaintiffs in Schalmo are now trying to cite our Heat Rise Testing as evidence that the tire is defective for generating excessive temperatures." As recounted by Mr. Musnuff, the *Schalmo* plaintiffs were "highlight[ing] the Heat Rise testing **taken during the durability testing of the G159**." (PSOF Ex. 34) (emphasis added). Thus, as of May 2009, Mr. Musnuff knew the Heat Rise tests were a type of durability testing and that plaintiffs suing Goodyear in a G159 motor home case believed the Heat Rise tests were of great significance.

C. *Bogaert v. Goodyear*

Bogaert v. Goodyear involved an accident with a Fleetwood motor home and was filed in Maricopa County Superior Court in 2005. (Doc. 938-1 at 84). Goodyear was represented by Mr. Hancock as local counsel and Mr. Musnuff served as national coordinating counsel. As with all the other Goodyear cases which have been brought to the Court's attention, the *Bogaert* matter involved extreme difficulty in convincing Goodyear to produce documents. In early 2008, dissatisfied with Goodyear's discovery responses, the *Bogaert* plaintiffs filed a motion to compel. (Doc. 992-1

at 49). On March 20, 2008, the discovery special master ordered Goodyear to "produce the requested documents." (Doc. 992-1 at 66). In particular, Goodyear was ordered to produce the "testing conducted by Goodyear of its [G159] tires that was undertaken, at least in part, to determine the suitability of such tires to be driven at 65 mph without an undue risk of tread or belt edge separations." (Doc. 992-1 at 70). This was *identical* to the discovery request in *Woods* that led Mr. Taylor to list as responsive the various tests, including the Heat Rise tests.

On June 5, 2008, Mr. Musnuff emailed Mr. Hancock regarding the *Bogaert* case. That email stated, in relevant part:

> In meeting with [Goodyear Engineer] Jim Stroble yesterday, we came to conclude that we might be best served by producing data from additional tests of the Subject Tire.[17] As you know, we have produced the available electronically maintained high-speed test data in this case (and in Haeger and Haley [another G159 case] as well) along with the current protocol.
>
> One of the 30(b)(6) topics relates to testing done to make sure the tire was suitable for RV usage. There was no testing specifically done on RVs, **but our whole testing package was to ensure that the tire was suitable**

[17] As with his email in the *Woods* case, Mr. Musnuff was concerned with what would "best serve[ ]" Goodyear's interests rather than producing responsive documents.

> **for over-the-road applications, including RV.**
>
> In the Woods case, we were compelled to produce other testing data/protocols in addition to High Speed. There, we produced **(i) extended DOT testing data, (ii) heat-rise test data, (iii) bead durability (aka Run-flat) test data, and (iv) crown durability test data,** along with the current (evergreen) protocol for each of those tests. . . .
>
> Jim thinks that it may be helpful to produce these documents so that he can review them in preparation for his deposition. That seems ok with me. Do you agree? Thoughts?

(PSOF Ex. 31) (emphasis added). The first bolded portion above is a statement by Mr. Musnuff that as of June 5, 2008, he believed Goodyear's "whole testing package" was done to ensure the G159 was "suitable for over-the-road applications, including RV." That testing package included the Heat Rise tests. And the second bolded portion shows Mr. Hancock knew as of June 5, 2008 that "extended DOT testing data," "heat-rise test data," "bead durability . . . test data," and "crown durability test data" existed and it had been produced in another G159 case. Mr. Hancock responded to the email with "Let's discuss." Three months later, Mr. Hancock asked "Basil – Did you come to a conclusion on this?" And one month after that, Mr. Hancock said "Need to discuss this." The Heat Rise tests were never produced in *Bogaert*.

The history of *Bogaert* establishes three critical facts. First, *Bogaert* was filed in Arizona state court in 2005. Under Arizona Rule of Civil Procedure 26.1, Goodyear had affirmative disclosure obligations. Mr. Hancock claims to have explained these affirmative disclosure obligations to Mr. Musnuff but Mr. Musnuff now claims that prior to early 2007, he "was unaware of any test records relating to the G159 tire other than the DOT test data" Goodyear produced in every case. (Doc. 983-1 at 6). Mr. Musnuff stated under oath that he only started looking for test results in January 2007. Thus, the present record is clear that either Mr. Hancock did not explain Rule 26.1 or Mr. Musnuff and Goodyear chose to ignore it. Either way, Goodyear and its attorneys clearly had no interest in complying with their discovery obligations unless those obligations were in the "best interest[s]" of Goodyear. (PSOF Ex. 23, August 20, 2007 email) (emphasis added).

The second fact that the *Bogaert* record establishes is that long after its responses were served in the present case, Mr. Musnuff believed Goodyear's "whole testing package" was to ensure the suitability of the G159 for "over-the-road applications." That testing package included the Heat Rise tests, the extended DOT test, crown durability test, and the bead durability test. Therefore, prior to the present sanctions proceedings, Mr. Musnuff was of the opinion that *all* of these tests were responsive to a request for the data Goodyear used to determine the G159's suitability for use "over-the-road." In other words, in June 2008 Mr. Musnuff was of the opinion that the Heat Rise tests,

extended DOT test, the bead durability test, and the crown durability test were responsive to Plaintiffs' Third Request.

And the third fact established by the *Bogaert* record is that no later than June 5, 2008 Mr. Hancock knew of the existence of additional test data not produced in the present case. While there is no evidence that Mr. Hancock actually had copies of the underlying test results referenced in Mr. Musnuff's email, he knew that the tests existed and he either knew or should have known that the disclosures in the present case had been woefully inadequate.

Viewed together, Goodyear and its counsel took positions in the other G159 cases directly contrary to the positions they now ask this Court to accept. The positions taken in these other cases, when Goodyear and its counsel were not attempting to avoid sanctions, are reliable. As explained below, this means Goodyear, Mr. Hancock, and Mr. Musnuff knowingly concealed crucial documents in the present litigation.

XIII. Plaintiffs' Counsel Writes to Goodyear About Undisclosed Tests

Close to one year after the present case settled, Mr. Kurtz wrote to Mr. Musnuff and stated he had "great concern regarding the adequacy and honesty of the disclosures made" in this case. (Doc. 938-1 at 49). This concern was based on a newspaper article regarding *Schalmo*. That case had proceeded to trial and resulted in a 5.6 million dollar award against Goodyear.

(Doc. 938-1 at 12). According to the newspaper article, during trial the *Schalmo* plaintiffs had presented "Goodyear documents including internal heat and speed testing and failure rate data." (Doc. 938-1 at 12). Mr. Kurtz observed that no such data was produced in this case and he asked Mr. Musnuff whether such records actually exist. In response, Mr. Musnuff stated "Goodyear stands behind its discovery responses in the *Haeger* case, and we stand behind the properly-stated objections to the scope of the discovery requests propounded by the plaintiffs in this case." (Doc. 938-1 at 53). Mr. Kurtz then emailed Goodyear's counsel, asking for a direct answer whether "internal heat test records" existed. (Doc. 938-1 at 56). Mr. Musnuff responded that it would not be "productive to debate these issues further." (Doc. 938-1 at 56).

Mr. Kurtz sent a follow-up letter, which Mr. Musnuff responded to by claiming Mr. Kurtz' allegations were "unprofessional and without merit." (Doc. 938-1 at 66). Mr. Musnuff stated Goodyear had "abided by all of Judge Silver's rulings and we take issue with any suggestion that we were disrespectful or misled the court in any manner or that we failed to comply with any of her rulings in this case." Mr. Musnuff admitted "it is true there are testing records regarding the [G159] tire that were not produced in the *Haeger* litigation. *That fact was clear during the course of the litigation*, and certainly at the time plaintiffs chose to

resolve this case."[18] (Doc. 938-1 at 66) (emphasis added). Mr. Musnuff then offered a disturbing explanation of what happened.

> Plaintiffs propounded a request that Goodyear produce all testing data related to the Subject Tire. However, that did not automatically create an obligation that Goodyear produce all testing data in this case. Goodyear responded to plaintiffs' request by objecting to the scope of the request on several good-faith grounds. . . . Goodyear did produce DOT testing data in response to plaintiffs' request, showing that the Subject Tire was in full compliance with FMVSS 119, but Goodyear objected to the production of any other testing data. We never represented that this DOT testing data comprised the totality of testing done with regarding to the Subject Tire, a fact which you have conceded.

Mr. Musnuff stressed that Goodyear's objections to the First Request did "not set or establish the appropriate scope of discovery. That is the province of the court."

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[18] There is no plausible way to read the record as supporting this contention. It certainly was *not* clear to the Court that Goodyear was withholding documents regarding the G159's performance in "highway" testing. Had it been "clear" to the Court what Goodyear and its counsel were doing, the Court would have immediately ordered disclosure and imposed sanctions for misconduct. To claim this Court would *knowingly* allow Goodyear to withhold relevant and discoverable information is outrageous. In addition, the claim by Goodyear's counsel that Plaintiff's allegations were "unprofessional and without merit" is preposterous. (Doc. 938-1 at 66).

(Doc. 938-1 at 67). Because Plaintiffs never filed a motion to compel regarding "all testing data," Goodyear had no obligation to produce all such data.

Mr. Musnuff also explained that the High Speed tests eventually produced were in response to "additional requests for production" but Goodyear "never represented that this high speed endurance testing data comprised the totality of testing done with regard to the Subject Tire." (Doc. 938-1 at 67). There was no mention in Mr. Musnuff's letter that Mr. Kurtz had withdrawn or narrowed his First Request.

XIV. Plaintiffs File Their Motion for Sanctions

On May 31, 2011, Plaintiffs filed a motion for sanctions based on alleged "discovery fraud." (Doc. 938). Plaintiffs argued Goodyear had "knowingly concealed crucial 'internal heat test' records related to the defective design of the G159." (Doc. 938 at 1). Plaintiffs pointed to their First Request as evidence that they had sought "all test records for the G159 tires." (Doc. 938 at 5). Plaintiffs claimed they had been misled by Goodyear's tactic of objecting and answering the First Request. (Doc. 938 at 8). This led Plaintiffs to believe "that the responsive information [was] being disclosed and Goodyear [was] simply preserving objections." (Doc. 938 at 8).

Goodyear filed a lengthy response to the motion. (Doc. 948). That opposition began with an attempt to recount the history of discovery. As recited by Goodyear, Plaintiffs' First Request sought "all test records."

(Doc. 948 at 3). Goodyear admitted it responded to this request by objecting and by providing the DOT test but argued it "never represented that the DOT test data comprised the totality of testing with regard to the G159 tire." (Doc. 948 at 3). Goodyear next explained that the High Speed tests it did produce were in response to the Third Request. (Doc. 948 at 3-4). According to Goodyear, the tests Plaintiffs were now referencing, *i.e.*, the Heat Rise tests, did not qualify as "high speed testing" responsive to the Third Request and, therefore, were not produced. (Doc. 948 at 4). This last statement requires detailed scrutiny.

Plaintiffs' Third Request sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 or 75] mph highway purposes." Goodyear's response to the motion for sanctions argued the Heat Rise tests were not responsive because they were "not high speed testing at all." (Doc. 948 at 4). As a preliminary matter, Goodyear's response is confusing given that the Third Request did not seek "high speed testing." It sought documents which related to *any* speed or endurance testing to determine the G159 was suitable for highway purposes; a test conducted at low speeds would be responsive to this request. Thus, Goodyear's claim that it did not need to produce the Heat Rise tests in response to the Third Request because the Heat Rise tests were not "high speed testing" was, in large part, a non-sequitur. But even more importantly, Goodyear's opposition to the sanctions motion did not argue

the tests were non-responsive due to Goodyear's decision not to rely on them as proof the G159 was suitable for highway use. That is, Goodyear argued only that the "internal heat tests" were not "high speed testing;" it did not argue the tests were withheld because Goodyear had not relied on them to determine suitability for highway purposes. As set forth later, the failure to make this argument is telling.

Finally, Goodyear's opposition to the sanctions motion claimed its behavior during discovery had "unambiguously indicat[ed] that it would not produce *all* test data." (Doc. 948 at 4). The Court is at a loss to determine what Goodyear believed was an "unambiguous" indication that it was withholding certain tests performed on the G159 tire. Both Plaintiffs and the Court were unable to perceive this "unambiguous" indication and Goodyear's statement is incredibly inaccurate. Throughout the numerous discovery dispute filings and hearings, the Court was under the impression that Goodyear had produced *all* test data relevant to Plaintiffs' claims.[19] In fact, at various points the Court became exasperated with Plaintiffs' apparently unsubstantiated claims that additional information must exist. Based on personal observation and discussions with Mr. Hancock during in-court hearings, the Court came to believe Mr. Hancock thoroughly understood his discovery obligations and that he was making every effort to comply with them. There simply was no

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[19] According to the Court's calculations, the parties spent approximately sixteen hours in court on discovery matters. This is an extraordinary amount of time.

reason for the Court to question Mr. Hancock's representations and Plaintiffs' repeated attempts to cast aspersions on Mr. Hancock appeared misguided. Of course, now that Goodyear has been forced to admit additional information does exist, that exasperation was misplaced. Suffice it to say, had there ever been an "unambiguous" indication that Goodyear was withholding certain test data, the Court would have immediately addressed it and taken appropriate action.

Before filing their reply, Plaintiffs asked the Court to order Goodyear to produce "the requested tests." (Doc. 949 at 2). Goodyear opposed that motion and argued it should not have to produce the "heat test" documents because "Goodyear has committed no discovery violation." (Doc. 951 at 4). On October 5, 2011, the Court concluded there were "serious questions regarding [Goodyear's] conduct in this case" and, based on the Court's power to conduct an independent investigation, ordered Goodyear to produce "the test results at issue." (Doc. 954 at 1). Goodyear produced the Heat Rise tests but kept numerous other tests concealed. After obtaining the Heat Rise tests, Plaintiffs filed their reply and explained the importance of the tests. (Doc. 963). Spartan subsequently joined the motion for sanctions, arguing it also suffered harm as a result of Goodyear's alleged misconduct. (Doc. 966).

XV. Explanation of Undisclosed Test Results

The initial motion for sanctions centered on the Heat Rise tests. Those tests are titled "Laboratory Durability Testing – Heat Rise" and were conducted on four G159 tires on April 21, 1996. The tests were meant to "determine the dynamic heat build-up at specific loads, speeds, and inflations." (Doc. 963-1 at 7). The Heat Rise tests were conducted on a "67.23 [inch] diameter flywheel" and consisted of running the tires at 35 miles per hour and checking the temperature of the tire at certain intervals. (Doc. 963-1 at 7). The Heat Rise tests describe 35 miles per hour as reflecting "highway use." Even though 35 miles per hour seems substantially slower than highway speeds, the rationale for this description is explained by Goodyear's 30(b)(6) witness. Testing a tire on a 67-inch flywheel places "upwards of double the speed" impact on a tire as the tire impact of "a vehicle on a road surface." In other words, "if you run 45 miles an hour on the steel flywheel [that] is the equivalent temperaturewise of 70, 80 miles an hour on the public highway as far as the heat history goes." (Doc. 963-1 at 61). Under this logic, testing tires at 35 miles per hour on a flywheel would be the equivalent of 55-65 miles per hour on the highway.

According to the Heat Rise tests, after running at 35 miles per hour, the G159 tires generated temperatures of up to 229 degrees. The parties now dispute whether these temperatures were cause of concern. Plaintiffs have cited to Goodyear's internal documents, Goodyear's expert, and Goodyear's 30(b)(6) witness as

stating this temperature was sufficiently high to be cause for concern. Goodyear counters that these temperatures were no more damning than other evidence already in Plaintiffs' possession. Whether Plaintiff or Goodyear is correct, it is clear that Plaintiffs believe the Heat Rise tests would have been helpful to their case. And regardless of the position now adopted by Goodyear and its counsel, there can be no serious dispute that the Heat Rise tests were relevant to Plaintiffs' claims.

XVI. Court's Preliminary Order

On February 24, 2012, the Court issued "Proposed Findings of Fact and Conclusions of Law." (Doc. 970). After recounting the behavior by Goodyear and its counsel, the proposed order concluded sanctions were appropriate. The proposed order focused on Goodyear's failure to produce the Heat Rise tests and the repeated statements by Mr. Hancock that all responsive documents had been produced.

The proposed order first concluded the First Request seeking "all tests" remained in place and Goodyear's attempt to respond by objecting and providing a limited set of documents was inappropriate. (Doc. 970-1 at 18). Therefore, the Heat Rise tests should have been produced in response to the First Request. Next, the proposed order recounted that the Heat Rise tests also were responsive to the Third Request where Plaintiffs sought "documents which relate to any speed or endurance testing to determine that the [G159] was

suitable for [65 and 75] mph highway purposes." (Doc. 970-1 at 18-19). The proposed order focused on the argument made by Goodyear that the Heat Rise tests did not qualify as "high speed testing." The Court rejected this position because Plaintiffs had never limited their request to "high speed testing." Moreover, the Heat Rise tests themselves were labeled as "highway testing," meaning they easily qualified as "high speed testing." In fact, the Court preliminarily concluded the tests were "*obviously* responsive" to a request for testing to determine suitability for "highway purposes." (Doc. 970-1 at 22). The Court did not address, because Goodyear did not argue, that the Heat Rise tests were not responsive because Goodyear had not relied on them when determining the G159's suitability for highway use.

The proposed order noted that despite clear evidence that someone had behaved inappropriately, the record was not sufficiently clear to determine who was "responsible for each instance of misconduct" nor was it sufficiently clear to determine "the appropriate amount to be awarded." (Doc. 970-1 at 23). The Court directed Goodyear and its counsel to "file either joint or separate briefs" addressing the proposed order. (Doc. 970).

XVII. Briefing After Preliminary Order

Based on the proposed order, Mr. Hancock, Mr. Musnuff, and Goodyear retained new counsel and filed separate responses. The contents of that briefing must

be analyzed in some detail to show the different positions adopted by Mr. Hancock, Mr. Musnuff, and Goodyear once they realized that the Court was taking the matter seriously.

A. Mr. Hancock's Response

Mr. Hancock's response focused on the timing of his statements to the Court and his knowledge about the Heat Rise tests. Mr. Hancock explained that he "did not see the Heat Rise test until it was ordered to be produced following Plaintiffs' Motion for Sanctions" and he was not involved in any discussions to determine whether the Heat Rise tests were responsive to a discovery request. (Doc. 980 at 3). Mr. Hancock claimed it would be inappropriate to sanction him for any of his in-court statements because, at the time he made the statements, he did not know they were false.

B. Mr. Musnuff's Response

Mr. Musnuff's response focused on the fact that he allegedly held a good faith belief that the Heat Rise tests were not responsive to Plaintiffs' Third Request. According to Mr. Musnuff, as of early 2007 Goodyear's only outstanding discovery obligation was to respond to Plaintiffs' Third Request.[20] (Doc. 983 at 5). As allegedly understood by Mr. Musnuff, Plaintiffs' Third Request

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[20] This is misleading as Mr. Musnuff's January 11, 2007 email to Mr. Hancock admitted Goodyear might need to supplement its prior responses "to show the testing of this tire at various speeds."

was limited to those tests which Goodyear relied upon "to determine suitability of the G159 for 65 and 75 miles per hour." (Doc. 983 at 8). Allegedly based on conversations with Goodyear employees, Mr. Musnuff came to believe that the *only* testing data Goodyear relied upon to determine suitability were the High Speed tests which were produced to Plaintiffs in June 2007.

Somewhat bizarrely, Mr. Musnuff's response also argued that the objections which accompanied the responses to Plaintiffs' Third Request were "asserted for technical reasons only, and [were] not indicative that additional responsive documents were located." (Doc. 983-1 at 8). In his letters to Mr. Kurtz before the sanctions motion was filed, Mr. Musnuff had repeatedly taken the position that the objections to the First Request *were* an indication that other documents existed. Thus, Mr. Musnuff seemed to be arguing Plaintiffs should have realized Goodyear's objections to the First and Third Requests were conveying precisely opposite positions. Mr. Musnuff provided no explanation how Plaintiffs should have arrived at this conclusion.

C. Goodyear's Response

As with Mr. Musnuff's response, Goodyear's response focused on its position that it did not use the Heat Rise tests to determine the G159 was suitable for highway purposes. Accordingly, Goodyear argued that the Heat Rise tests were not responsive to Plaintiffs' Third Request. Goodyear made no serious attempt to

explain why the Heat Rise tests were not produced based on Plaintiffs' First Request. Instead, Goodyear merely noted that it had objected to the First Request. (Doc. 984 at 4). Goodyear also argued there was no deliberate strategy to conceal the Heat Rise tests because it produced the Heat Rise tests in two other cases where the plaintiffs "sought 'heat testing' or . . . obtained a Court order compelling production of 'all tests.'" (Doc. 984 at 7).

Goodyear's response was supported by the declaration of Ms. Okey. According to that declaration, the Heat Rise tests were "produced in the *Woods* case in August 2007 in response to a court order requesting production of *all* tests. Moreover, the same report was produced in the *Schalmo* case in August 2008, where the plaintiffs specifically sought discovery relating to, among other things, heat testing." (Doc. 984-1 at 5). These two statements were either misleading or false.

First, there was never an order in the *Woods* case requiring the production of "*all* tests." Instead, the order required Goodyear to "produce to the Plaintiff every document requested" in the plaintiffs' Fifth Request for Production of Documents. (Doc. 992-1 at 127). That request did not contain a request for "all tests" and Ms. Okey's statement to the contrary is wrong. The decision to submit a written declaration containing such a statement – a situation where careful review and drafting is possible – shows an unfortunately casual attitude to the issues presented by Plaintiffs' motion.

And second, Ms. Okey's statement regarding the *Schalmo* case may not qualify as false but it is at least a deliberate attempt to mislead. As explained earlier, Goodyear's responses to the discovery requests in *Schalmo* specifically listed the Heat Rise tests as responsive to a request for "all documents reflecting studies, analysis or testing . . . associated with determining the appropriate speed rating, Load Range and/or vehicle application of the G159 tires." (Doc. 992-1 at 4). Ms. Okey, perhaps hoping the Court would not look to the underlying documents, makes no effort to explain the situation in *Schalmo* or that the Heat Rise tests were not produced *only* in response to a request for "heat testing." Again, Ms. Okey's casual attitude to the underlying facts in *Schalmo* do not reflect well on her or Goodyear.

Finally, in making its various arguments against the proposed order, Goodyear inadvertently disclosed that there were *other* tests which it had not disclosed in this case. In its response, Goodyear attempted to explain that it gave Mr. Musnuff "the only W84 high speed test data [it] was able to locate." (Doc. 984 at 6). In a footnote, Goodyear provided further context, stating it "produced 16 different high speed test results, but 12 of those test results were performed in 2000 and relate to G159 Series tires used by NASCAR. Moreover, Goodyear also produced several crown durability, bead durability and DOT endurance tests." (Doc. 984 at 6). In support of this latter statement, Goodyear

cited to a declaration by Richard J. Olsen, the individual Goodyear had used as its 30(b)(6) witness. (Doc. 984-1 at 13).

In his declaration, Mr. Olsen tried to explain how his testimony during his deposition was accurate but, in doing so, Mr. Olsen accidentally revealed it was not. Mr. Olsen's declaration stated that during his deposition, he had been "asked if there [were] 'any separate testing' besides the tests Goodyear produced, which included DOT tests, crown durability tests, bead durability tests and high speed tests." (Doc. 984-1 at 17). During the deposition, Mr. Olsen had responded "that a number of different tests are run in the development process but they could not be found." (Doc. 984-1 at 17). Because Mr. Olsen apparently believed that Goodyear had disclosed "crown durability tests, bead durability tests and high speed tests," his deposition testimony that no other testing existed was, in his mind, accurate. Mr. Olsen's declaration stated he stood by that deposition testimony. (Doc. 984-1 at 17). Unfortunately for Mr. Olsen, his deposition and declaration were both false.

Four days after filing Mr. Olsen's declaration, Goodyear filed a "Notice of Correction." That notice stated "the crown durability, bead durability and DOT endurance tests were not produced in this case." (Doc. 989 at 2). The notice provided no explanation why Mr. Olsen had submitted a false declaration here or how Mr. Olsen's deposition testimony could be viewed as accurate given that other tests existed. In fact, it is no

longer possible that Mr. Olsen's deposition testimony was even close to accurate.

The present record shows that Mr. Olsen knew about "the crown durability, bead durability, and DOT endurance tests" at his deposition. Those tests had not been produced to Plaintiffs. During his deposition, he was asked if there was "any separate testing that would have been done on this . . . particular tire" other than that already produced by Goodyear. Mr. Olsen responded there were other tests, but he did not have them. That was false. He was then asked if the other tests were still available. He stated "I don't believe so." That was false. In short, Goodyear's 30(b)(6) witness provided false testimony but the falsity emerged only as a result of Goodyear's inability to keep its falsehoods straight. A responsible corporation would have corrected the false deposition testimony immediately after the fact. At the very least, a responsible corporation would not compound the problem by submitting a false declaration affirming the false deposition testimony. Goodyear has not offered an explanation for Mr. Olsen's testimony or its own inexplicable behavior. The only reasonable conclusion is that Goodyear was, and continues to be, operating in bad faith.

XVIII. Additional Briefing

Dissatisfied with Mr. Hancock, Mr. Musnuff, and Goodyear's inability to provide clear answers on certain issues, the Court directed additional briefing addressing five questions. This briefing included further evolution of certain positions.

A. Production in *Schalmo*

The first question the Court asked was why Goodyear produced the Heat Rise tests in *Schalmo* but withheld them in *Haeger*. (Doc. 995 at 1). Goodyear and Mr. Musnuff responded that the *Schalmo* responses were prepared by Florida counsel and neither Mr. Musnuff nor anyone at Goodyear knew, in particular, why the Heat Rise tests were produced. (Doc. 1000 at 3; Doc. 1001 at 3). Mr. Hancock claimed he had not been involved in *Schalmo* and could not opine on anything that happened in that case. (Doc. 999 at 11).

Mr. Musnuff and Goodyear's inability to provide a reasonable explanation for the differences between *Schalmo* and *Haeger* is telling. Given the attempt to shift the blame to Florida counsel, it is manifestly clear the *Schalmo* disclosure was a result of Goodyear inadvertently giving the Heat Rise tests to local counsel and that counsel then producing the tests, unaware that Goodyear did not want to produce them (allegedly because they were totally irrelevant and conducted for no reason).

B. Other Tests

The second question posed by the Court was whether the "'crown durability, bead durability and DOT endurance test reports' should have been produced" in the present case. (Doc. 995 at 2). Mr. Musnuff responded that they "should *not* have been produced in the *Haeger* litigation" because they were not responsive to Plaintiffs' Third Request. (Doc. 1000

at 10). Goodyear also maintained that they were not responsive to Plaintiffs' Third Request. (Doc. 1001 at 4). Goodyear admitted, however, that "if Plaintiffs' First Request for Production remained operative," the tests "should have been produced." (Doc. 1001 at 5). Mr. Hancock responded that he had "no knowledge concerning these new tests, the purpose of these tests, or what these tests represent." (Doc. 999 at 12). These positions present a dizzying array of misstatements and simple falsehoods.

The positions argued by Mr. Musnuff and Goodyear cannot be reconciled with the facts. As evidenced by the proceedings in *Woods*, both Mr. Musnuff and Goodyear (through its employees), knew the Heat Rise tests, the crown durability test, the bead durability test, and the DOT endurance tests were all responsive to a request for the testing Goodyear used to determine the G159's suitability. Thus, all these tests were responsive to Plaintiffs' Third Request. Mr. Musnuff also knew these tests were responsive to Plaintiffs' First Request. Moreover, the record demonstrates that Mr. Musnuff believed the First Request remained in place and Goodyear's admission that these documents should have been produced in response to that request means Mr. Musnuff deliberately withheld these responsive documents in the "best interest[s]" of Goodyear. It is only now, after having been caught withholding the documents, that Mr. Musnuff is formulating his convoluted argument that he withheld them because they were not responsive to the Third Request. And while Goodyear can be commended for its candor in

admitting these tests are responsive, it failed to provide any explanation why its 30(b)(6) witness testified falsely at his deposition that no tests other than those already produced to Plaintiffs existed.

As for Mr. Hancock, his claim that he did not know about these additional tests is false. As shown by the email from Mr. Musnuff to Mr. Hancock in the *Bogaert* matter, Mr. Hancock *did* know about these tests and *did* know they were part of Goodyear's "whole testing package" to determine the G159 was suitable for "over-the-road" use.

C. Heat Rise Tests Conflict with Representations

The third question posed by the Court was whether "the results of the Heat Rise tests conflict with any representation made during" the present case. In response, Mr. Hancock admirably admitted that the mere fact that the Heat Rise tests exist meant some of his statements were incorrect. (Doc. 999 at 12). Mr. Musnuff and Goodyear responded they were unable to determine whether the Heat Rise test results conflict with any representation.

Mr. Musnuff and Goodyear's responses were not good faith responses. At the time they filed their responses, Mr. Musnuff and Goodyear knew that Mr. Hancock had made various in-court statements which were later proven false. For example, Mr. Hancock had represented that Goodyear had responded to all discovery and that no other documents existed. The

existence of the Heat Rise tests means that Mr. Hancock's statements were incorrect and Mr. Musnuff and Goodyear's inability to acknowledge that basic fact is disturbing.

D. Party Responsible for Not Producing Heat Rise Tests

The fourth question was who was responsible for not producing the Heat Rise tests. Mr. Hancock responded that he could not be held responsible as he was unaware that the tests existed. Mr. Musnuff claimed he was jointly responsible with Goodyear because Goodyear had informed him that it did not use the Heat Rise tests to determine the G159's suitability for highway use. Thus, based on this information, Mr. Musnuff allegedly decided not to produce the test in response to Plaintiffs' Third Request. Goodyear argued that only Mr. Musnuff should be held responsible because it provided the Heat Rise tests to Mr. Musnuff and it relied on him "to prepare discovery responses, to identify documents responsive to discovery requests and to handle day-to-day management of the *Haeger* case." (Doc. 1001 at 8). In Goodyear's view, there was "no evidence that Goodyear itself acted in bad faith or deliberately concealed G159 Tire test results." (Doc. 1001 at 8). This latter statement is of some interest.

It is now clear that Goodyear's 30(b)(6) witness testified falsely at his deposition regarding the Heat Rise tests, the crown durability test, the bead durability test, and the DOT endurance tests. Therefore, the

claim that Goodyear itself did not deliberately conceal *any* "G159 Tire test results" is not true. (Doc. 1001 at 8). In addition, Ms. Okey retained final say regarding discovery responses and she must have known that Goodyear's responses in the present case were grossly inaccurate. Goodyear's attempt to shift blame entirely onto its counsel is not supported by this record.

E. Not Produced in *Bogaert*

The final question posed by the Court was why the Heat Rise tests were not produced in the Arizona state case of *Bogaert v. Goodyear*. Mr. Hancock responded he informed Mr. Musnuff and Goodyear about the "affirmative disclosure obligations under the Arizona Rules of Civil Procedure" but he had no idea the Heat Rise tests even existed at the time *Bogaert* was litigated. Goodyear stated it did not know for certain if the Heat Rise tests had been produced in *Bogaert*. And Mr. Musnuff responded the Heat Rise tests were not produced because the *Bogaert* plaintiffs "sought testing used by Goodyear to determine the tire's suitability for 65 and 75 miles per hour." (Doc. 1000 at 11).

In effect, neither Mr. Musnuff nor Goodyear were able to offer *any* plausible basis for not producing the Heat Rise tests in *Bogaert*. Mr. Musnuff's explanation that he only produced tests specifically sought by the *Bogaert* plaintiffs in a discovery request shows such a fundamental misunderstanding of his disclosure obligations under Arizona law that it is surprising Mr. Musnuff would assert such a position without some

further explanation. *See Norwest Bank (Minnesota), N.A. v. Symington*, 3 P.3d 1101, 1105-06 (Ariz. Ct. App. 2000) (explaining disclosure obligations and specifically rejecting claim that information need only be produced in response to precise discovery request). Mr. Musnuff's failure to acknowledge that the failure to disclose the Heat Rise test in *Bogaert* was improper shows he still has not grasped that his behavior was inappropriate.

Goodyear's position is equally perplexing in that it refuses to admit the obvious, *i.e.* that the Heat Rise tests should have been produced in *Bogaert*. Goodyear's failure to straightforwardly admit that its counsel committed such an obvious error gives the impression that Goodyear lacks remorse for the mistakes made on its behalf. As with its response to the false testimony by its 30(b)(6) witness, Goodyear is not behaving responsibly.

And finally, Mr. Hancock's response was evasive in that the record now establishes Mr. Hancock knew of the Heat Rise tests (and other tests) while *Bogaert* was being litigated. There is no explanation for Mr. Hancock's willingness to aid Mr. Musnuff and Goodyear in flouting Arizona's disclosure rules.

XIX. Evidentiary Hearing

The Court held an evidentiary hearing on March 22, 2012. At that hearing, Mr. Musnuff and Mr. Hancock testified. Mr. Musnuff's testimony conflicted with the documentary evidence and was not credible. Mr.

Hancock's testimony, while more reliable than Mr. Musnuff's, still conflicted with the underlying evidence and was not entirely credible.

A. Mr. Musnuff's Testimony

Mr. Musnuff's testimony covered a variety of topics, including his explanation for when he first received the Heat Rise tests and what he understood the Heat Rise tests to mean. Despite the written declaration by Mr. Taylor that he gave the Heat Rise tests to Mr. Musnuff in January 2007, Mr. Musnuff testified he first learned of the Heat Rise tests sometime in August 2007. (Doc. 1014 at 97). When pressed, Mr. Musnuff explained that Mr. Taylor's representations that the Heat Rise tests were located and provided to Mr. Munsuff in January 2007 was a mistake. (Doc. 1014 at 122). Moreover, according to Mr. Musnuff, the January 24, 2007 date printed on the Heat Rise tests was inaccurate and no one could figure out what it meant.

Next, Mr. Musnuff testified that he determined the Heat Rise tests were not responsive to Plaintiffs' Third Request based on statements made to him by "numerous Goodyear engineers" that the tests had "nothing to do with the durability of the tire or its ability to function at highway speeds." (Doc. 1014 at 29). Mr. Musnuff asserted he was "repeatedly told by Goodyear that the only test determined for suitability for 65 and 75 mile an hour highway use was the W84 tests." (Doc. 1014 at 29-30). When asked to explain this in more detail, Mr. Musnuff stated:

> As was explained to me by the Goodyear engineers, the heat rise test is not a test to evaluate the tire itself. It's a compounder's test used to evaluate different compounds that might be used in different tires; or if you're trying to improve a compound or such, you might test one and then test another. You have to test them in something so you test them in a tire, but they're really evaluating the compound rather than the tire.

(Doc. 1014 at 34). The Court could not understand this statement and pressed Mr. Musnuff for a more precise explanation:

> The Court: If one compound is better than one, but the purpose [of the Heat Rise tests] is to improve the quality of the tire; right?
>
> Mr. Musnuff: I would think that all of the engineering that Goodyear does is to ultimately to try to improve the quality of the products.
>
> The Court: So, then, in essence, then, it does have something to with its endurance or durability because that is, at bottom, what is important to Goodyear; right?
>
> Mr. Musnuff: Well, no. Your Honor, if I can disagree. As it was explained to me, that this is in no way a durability test or an endurance test. . . . It's just to provide – it's like an information point only. . . .

> The Court: So if one of the compounds was found . . . to be better than another compound, what would the engineering group do?
>
> Mr. Musnuff: That I don't know.
>
> * * *
>
> The Court: But what was [the Heat Rise test] designed to do?
>
> Mr. Musnuff: Just to provide information that a compounder could look at.
>
> The Court: Was it academic or was it for recreation? What was it for?
>
> Mr. Musnuff: No, not academic but there's no qualified – there's no standard that applies to it. . . . It's just to provide a point of information so that you can compare one compound you're testing versus another compound you're testing.

Mr. Musnuff explained that he talked to Mr. Taylor and Mr. Stroble regarding the Heat Rise tests and they informed him the tests were not responsive because Goodyear had not relied on them when determining the suitability of the G159 for highway use. (Doc. 1014 at 40).

On cross-examination, Mr. Musnuff testified that the Heat Rise tests were not even relevant to Plaintiffs' allegations. (Doc. 1014 at 45). Mr. Musnuff did concede, however, that the Heat Rise tests qualified as "wheel tests" which were requested by Plaintiffs in their First Request. Mr. Musnuff admitted Goodyear

never supplemented its responses to the First Request nor did it otherwise alert Plaintiffs that tests were being withheld. (Doc. 1014 at 46, 54). Mr. Musnuff also stated he did not recall questioning why the Heat Rise tests were labeled "durability tests" if they were not, in fact, durability tests. (Doc. 1014 at 50).

Towards the end of the cross-examination, Mr. Musnuff admitted he attended the deposition of Goodyear's expert where that expert expressed the opinion that "heat in excess of 200 degrees for a prolonged period of time . . . can lead to tread separations." (Doc. 1014 at 79). Despite the fact that the Heat Rise test established the G159 "was running at 229 degrees," Mr. Musnuff maintained it was utterly irrelevant because the Heat Rise test had "nothing to do with measuring the durability of the tire." (Doc. 1014 at 80).

After all counsel concluded their questioning of Mr. Musnuff, the Court asked a series of questions. First, the Court asked why the Heat Rise tests were turned over in *Schalmo* but not in *Haeger*. Mr. Musnuff explained that he came to believe Mr. Kurtz had narrowed his discovery request such that the Heat Rise tests were not responsive to any outstanding request. (Doc. 1014 at 128-29). Next, the Court asked why there were no efforts to locate any testing before January 2007. Mr. Musnuff explained that there had been no case before 2003 that "required . . . production of further testing beyond the compliance testing Goodyear routinely produced. (Doc. 1014 at 131). Third, the Court confirmed Mr. Musnuff had been present for the depositions of the various experts. (Doc. 1014 at 133).

Mr. Musnuff confirmed that he was present for Goodyear's expert's deposition and that the expert had stated "anything over 200 [degrees] could cause separation." (Doc. 1014 at 134). Despite the Heat Rise tests casting serious doubt on this opinion, Mr. Musnuff stated he had behaved properly because the Heat Rise tests were not responsive to any discovery request. When the Court expressed some confusion how Mr. Musnuff believed it was proper for him to allow Goodyear's expert to provide testimony directly undercut by Goodyear's own testing, Mr. Musnuff repeated that the Heat Rise tests had absolutely no practical application other than providing a "data point" to compare two compounds. (Doc. 1014 at 137). The results of the Heat Rise tests "mean[] nothing, essentially nothing in terms of durability on the road." (Doc. 1014 at 139).

Finally, the Court confirmed that the Heat Rise tests had been used during the *Schalmo* trial to show the G159 was defective. (Doc. 1014 at 138). Based on a question from Plaintiff's counsel, Mr. Musnuff confirmed that in *Schalmo*, Goodyear never disclosed that its expert in *Haeger* had "said the tire would foreseeably fail at [temperatures] above 200 degrees." (Doc. 1014 at 144). Based on the entire record, Mr. Musnuff's testimony was not credible.

To begin, the Court concludes Mr. Musnuff received the Heat Rise tests in January 2007. As stated by Mr. Taylor, the High Speed tests and Heat Rise tests were uncovered in the same database and, according to the date printed on all those documents, printed in January 2007. While Mr. Musnuff may not remember

getting the Heat Rise tests at that time, Mr. Taylor's version of events makes more sense and is supported by the date printed on the Heat Rise tests.

Next, Mr. Musnuff's repeated position that he did not turn over the Heat Rise tests because he was told by individuals at Goodyear that they were not responsive cannot be taken seriously. The claim that the Heat Rise tests were merely to "provide information that a compounder could look at" is not reasonable. Goodyear performed the test for some purpose and Mr. Musnuff's own statements reflect this. For example, in his February 11, 2007 memo, Mr. Musnuff observed that a change in the compound of the G159 improved performance. (PSOF Ex. 12). Moreover, his June 5, 2008 email to Mr. Hancock stated Goodyear's "whole testing package" was to ensure the G159 was suitable for "over-the-road applications, including RV." (PSOF 31). And in an email dated May 8, 2009, Mr. Musnuff stated the Heat Rise tests were "taken during the *durability* testing of the G159." (PSOF Ex. 34) (emphasis added). Accordingly, prior to these sanctions proceedings, Mr. Musnuff knew the Heat Rise tests were part of Goodyear's testing used to determine the durability and suitability of the G159 for use on the road. His testimony to the contrary during the hearing cannot be believed.

Finally, Mr. Musnuff's claim that the Heat Rise tests were not even relevant to Plaintiffs' claim is frivolous. Mr. Musnuff knew Plaintiffs' theory and knew that Plaintiffs believed high temperatures caused tire

separations. Mr. Musnuff also knew that Plaintiffs' expert had stated the temperatures at which tire degradation would occur and knew the temperature Goodyear's own expert had testified about which would be cause for concern. Maintaining that the Heat Rise tests were irrelevant when they showed the temperature the G159 operated at when used at highway speeds is so obviously relevant that Mr. Musnuff's current position to the contrary is clear evidence he is operating in bad faith.

B. Mr. Hancock's Testimony

Mr. Hancock's testimony began with a discussion of his representation of Goodyear in the *Bogaert* case. (Doc. 1014 at 145). Mr. Hancock stated he had conversations with Mr. Musnuff regarding the requirements of Arizona Rule of Civil Procedure 26.1. (Doc. 1014 at 149). As the record now shows, Goodyear did not even attempt to locate testing data as part of its initial disclosure in *Bogaert*. Thus, either Mr. Hancock did not explain the requirements of Arizona Rule 26.1 to Mr. Musnuff and Goodyear or Mr. Musnuff and Goodyear chose to ignore that rule. Based on the entirety of the record, Mr. Hancock appears to have made no meaningful effort to ensure Goodyear was complying with the Rule.

Next, Mr. Hancock's testimony focused on his in-court statements in the present case. Mr. Hancock was adamant that at the time he made certain in-court statements, he had no prior exposure to the Heat Rise

tests. At one point during cross-examination, Mr. Hancock stated: "I have never heard, before [Plaintiffs'] motion was filed in this case for sanctions, of a heat rise durability test." And at another point, "I never saw the heat rise test until it was ordered produced in this case after [Plaintiffs'] motion. I did not know the contents of the heat rise test at any time prior to its production here. I did not know it was called anything other than a heat rise test, and no one mentioned it to me ever during any of the times referenced in the Court's order." (Doc. 1014 at 168).

On the topic of the High Speed tests which were eventually produced in response to Plaintiffs' Third Request, Mr. Hancock stated he learned of their existence "sometime prior to the third Request for Production," probably in "April or May of 2007." (Doc. 1014 at 158). Mr. Hancock admitted, however, that he was unclear on the exact date. (Doc. 1014 at 158). Mr. Hancock was asked why there had been a five month delay between when Mr. Musnuff said he first learned of the high speed tests in February 2007 and when they were produced in June 2007. The response was: "I don't know the answer to that, sir, because that would have been between Goodyear and Mr. Musnuff. I know that I received the documents with clearance to produce them on June 20, 2007." (Doc. 1014 at 159).

Mr. Hancock then recounted the series of events regarding the eventual production of the High Speed tests as follows. At the April 6, 2007 hearing, Mr. Hancock was "taken aback" by the Court's question regarding outstanding discovery because "nobody had been

after [him] for any discovery." (Doc. 1014 at 164). When asked whether he knew about the High Speed tests at that time, Mr. Hancock responded "I haven't reviewed my records. I don't believe so but I don't know for certain. I apologize." Then, according to his testimony, sometime prior to May 17, 2007, he received Plaintiffs' Third Request. As of May 17, 2007, Mr. Hancock had sent the Third Request to Mr. Musnuff and Mr. Hancock "knew there was [high speed] testing." Mr. Hancock produced some of the high speed testing on June 6, 2007. (Doc. 1014 at 160). And produced the remaining tests on June 21, 2007. (Doc. 1014 at 159).

Finally, Mr. Hancock was asked regarding his behavior in connection with the deposition of Plaintiffs' expert Mr. Osborne. That deposition occurred on May 24, 2007. (Doc. 1014 at 164). At the time, Mr. Hancock knew Mr. Osborne "was under the impression that there was no high-speed testing at all." (Doc. 1014 at 166). When asked whether he told Plaintiffs prior to Mr. Osborne's deposition "that Goodyear had located those high-speed tests," Mr. Hancock admitted he did not. (Doc. 1014 at 167). Overall, Mr. Hancock was more credible than Mr. Musnuff but Mr. Hancock's testimony also established certain instances of inappropriate behavior.

It is now clear beyond dispute that Mr. Hancock knew in February 2007 that Goodyear had located the High Speed tests. Therefore, at the time of the April 6, 2007 hearing, Mr. Hancock had known about the high speed tests for two months and he had even acknowledged in an email to Mr. Musnuff that the tests should

be produced. His statements at that hearing that Goodyear had "responded to all discovery" and Goodyear was "done or nearly done" were false.

Next, as of February 2007 Mr. Hancock knew Goodyear had the High Speed tests and, as acknowledged in his own email, those tests were important in response to Plaintiffs' expert's report. Long before that expert's deposition, Mr. Hancock knew Plaintiffs and the expert had been materially misled regarding the scope of Goodyear's testing. Despite this knowledge, Mr. Hancock proceeded with the deposition of Mr. Osborne and only produced the High Speed tests after the deposition was complete. At best, this behavior was aimed at prolonging the litigation. At worst, this behavior was meant to prevent Plaintiffs from obtaining information which would help their case until it was too late for them to do anything with it.

And finally, Mr. Hancock's testimony that he had "never heard . . . of a heat rise durability test" before the present sanctions proceedings was false. As evidenced by the emails from *Bogaert*, Mr. Hancock was informed in 2008 that Goodyear had produced "heat-rise test data" in another G159 case. It is possible Mr. Hancock merely forgot about the *Bogaert* emails but, in the context of this case, it appears more likely that Mr. Hancock was not expecting Plaintiffs to gain access to the *Bogaert* emails and his testimony was an attempt to paint himself in a sympathetic light.

ANALYSIS

> What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting).

Mr. Hancock, Mr. Musnuff, and Goodyear engaged in repeated and deliberate attempts to frustrate the resolution of this case on the merits. From the very beginning, Mr. Hancock, Mr. Musnuff, and Goodyear adopted a plan of making discovery as difficult as possible, providing only those documents they wished to provide, timing the production of the small subset of documents they were willing to turn over such that it was inordinately difficult for Plaintiffs to manage their case, and making false statements to the Court in an attempt to hide their behavior. In the end, that plan succeeded in making this case far more complicated than necessary, requiring an absurd expenditure of resources by Plaintiffs and the Court.[21] Goodyear also

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[21] Prior to these sanctions proceedings, the parties filed approximately 163 motions, the Court issued 254 orders, and the case had close to 1,000 docket entries. By way of comparison, a patent case filed around the same time, and which included a twelve-day jury trial, ended with approximately 700 docket entries. *Dupont Air Products Nanomaterials, LLC v. Cabot Microelectronics Corp.*, CV-06-2952. And an incredibly complex ERISA

succeeded in obtaining a settlement from Plaintiffs, a settlement Plaintiffs now believe was less than they would have been able to achieve had Mr. Hancock, Mr. Musnuff, and Goodyear complied with their discovery obligations.

The necessity for sanctions in these circumstances is obvious. But the form those sanctions should take presents a very difficult question. As set out below, the Ninth Circuit case law does not provide clear guidance for remedying a years-long course of misconduct such as that presented here. If the misconduct had come to light while the case was ongoing, entry of default judgment with a trial on damages would have been the obvious solution. *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming striking of answer and entry of default judgment because of discovery misconduct). But this case is closed and the issue is the permissible scope of sanctions in this context. The Ninth Circuit seems to allow an award of sanctions only in the amount of harm directly caused by the sanctionable conduct. In the present circumstances, it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred. Neither the Court nor the Plaintiffs could separate the fees incurred due to legitimate activity from the fees and costs incurred due to Goodyear's refusal to abide by clear and simple discovery obligations. For example, if Goodyear had responded to Plaintiffs' First Request

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class action, filed a year earlier than the present case, ended this year with just over 750 docket entries. *Allen v. Honeywell*, CV-04-424.

with all responsive documents, Goodyear might have decided to settle the case immediately.[22] In these circumstances, one could conclude practically all of Plaintiffs' fees and costs were due to misconduct (*i.e.*, the case would have been resolved in an easy and straightforward manner absent Goodyear's obstructionism). Alternatively, one could conclude practically none of Plaintiffs' fees and costs were due to misconduct (*i.e.*, even if Goodyear had disclosed every responsive document in its possession, Goodyear could have refused to settle and prolonged the litigation through other tactics).

While there is some uncertainty how the litigation would have proceeded if Goodyear and its attorneys were acting in good faith, based on Goodyear's pattern and practice in G159 cases, the case more likely than not would have settled much earlier. In these circumstances, the most appropriate sanction is to award Plaintiffs *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request.[23] That was the first definitive proof that Goodyear was not going to cooperate in the litigation process. Instead, Goodyear believed discovery would consist of a "game of hide and

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[22] Of course, the evidence might have made Plaintiffs realize they had a winning trial and they would have refused to settle.

[23] The Court recognizes that Plaintiffs might have a contingency agreement with their counsel. The amount of sanctions will be calculated pursuant to the lodestar method and will not be limited to the amount paid by Plaintiffs as a percentage of the settlement. *Cf. Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1048 (9th Cir. 2000) ("A district court may not rely on a contingency agreement to increase or decrease what it determines to be a reasonable attorney's fee.").

seek." *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 790 (9th Cir. 2011); *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573, 579 (9th Cir. 1992) (faulting party for "treating discovery as a game instead of a serious matter); *United States v. $42,500*, 283 F.3d 977, 983 (9th Cir. 2002) ("A court is not a place to play hide-and-go-seek with relevant evidence and information."). Goodyear and its counsel must now pay the price for adopting this approach.

As permitted by Arizona law, Plaintiffs may wish to affirm their settlement agreement and pursue an independent cause of action for fraud based on Mr. Hancock, Mr. Musnuff, and Goodyear's behavior. But the present case has long been closed and it would be inappropriate to allow Plaintiffs to litigate their fraud claims here. *Cf. Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003) (allowing judgment to be set aside only upon showing of "grave miscarriage of justice").

I. Standard for Awarding Sanctions

Given that this case was closed pursuant to the parties' agreement, there are two possible bases for imposition of sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear: 28 U.S.C. § 1927 and the Court's inherent power.[24] As set out below, sanctions are appropriate under both.

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[24] Sanctions pursuant to Federal Rule of Civil Procedure 11 should be imposed before the case is closed. *See* Moore's Federal

A. 28 U.S.C. § 1927 Cannot Reach Goodyear's Conduct

Pursuant to 28 U.S.C. § 1927: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this statute, an attorney's conduct is sanctionable only if it multiplies the proceedings in both an "unreasonable and vexatious manner." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002). In addition, an attorney must have acted in bad faith or engaged in conduct tantamount to bad faith. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The imposition of sanctions under § 1927 requires a finding of bad faith."). But this statute allows for sanctions *only* against "an attorney or otherwise admitted representative of a party." *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986). Therefore, any sanctionable conduct by Goodyear itself is beyond the reach of § 1927.

B. Court's Inherent Power Reaches Goodyear and Counsel

"Under its inherent powers, a district court may . . . award sanctions in the form of attorneys' fees against *a party or counsel* who acts in bad faith, vexatiously,

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Practice § 11.22(2)(a) ("[T]he court should ordinarily impose [Rule 11] sanctions before issuing a final order.").

wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (emphasis added). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Thus, as with sanctions under Section 1927, before awarding sanctions under its inherent power, the Court "must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." *Id.*

C. Definition of Bad Faith

A comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible, but the type of conduct at issue "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). Such conduct includes "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991). And "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F.3d at 994. Therefore, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. *Id.*; *see also B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1108 (9th Cir. 2002) (same); *Malhiot v. S.*

Cal. Retail Clerks Union, 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith). It is of particular importance to note that it is "permissible to infer bad faith from [a party's] action[s] plus the surrounding circumstances." *Miller v. City of Los Angeles*, 661 F.3d 1024, 1029 (9th Cir. 2011). Accordingly, Mr. Hancock, Mr. Musnuff, and Goodyear are incorrect when they repeatedly claim the Court must, in effect, obtain a confession before imposing sanctions.

II. Type of Sanctions

Sanctionable conduct may result in both monetary and non-monetary relief.

A. Sanctions Under § 1927

Sanctions pursuant to § 1927 are limited to an amount equal to the additional expenditures incurred "as a result of the multiplicity of the proceedings." *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989). Any amount awarded pursuant to § 1927 must have been directly caused by the sanctionable conduct. *United States v. Blodgett*, 709 F.2d 608, 610-11 (9th Cir. 1983) ("Section 1927 only authorizes the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct; it does not authorize imposition of sanctions in excess of costs reasonably incurred because of such conduct."). But this rule is softened by the recognition that it is often "impossible to determine with mathematical precision the

fees and costs generated only by" the sanctionable conduct. *Lahiri v. Universal Music and Video Distribution Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010). District courts are permitted to exercise their discretion and make reasonable adjustments when attempting to determine the appropriate size of sanctions. *Id.* (affirming "reasoned exercise of discretion" regarding amount of fees awarded pursuant to § 1927).

B. Monetary Sanctions Under Court's Inherent Power

The Ninth Circuit recently ruled that compensatory sanctions under a Court's inherent power must be limited to the amount necessary to compensate the opposing party for the harm caused by the misconduct. *Miller*, 661 F.3d at 1029. In so ruling, the Ninth Circuit concluded a district court erred by awarding all of the attorneys' fees and costs to a plaintiff when the court did not make an explicit finding that the defendant's conduct caused plaintiff to incur all of those fees. *Id.* This holding seems to be in direct conflict with Supreme Court authority.

In *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the district court had relied on its inherent power and sanctioned NASCO a sum equal to "the entire amount of NASCO's litigation costs paid to its attorneys." *Id.* at 40. At the Supreme Court, Chambers challenged this amount by arguing "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular

wrong." *Id.* at 57. The Supreme Court rejected this argument, finding "the frequency and severity of Chambers' abuses of the judicial system" meant "[i]t was within the court's discretion to vindicate itself and compensate NASCO by requiring Chambers to pay for all attorney's fees." *Id.* at 57. This is a rejection of the position that only monetary harms incurred as a direct result of sanctionable conduct can be remedied.

It is difficult to reconcile *Chambers* with the Ninth Circuit's recent *Miller* decision. *See Miller*, 661 F.3d at 1039 (Ikuta, J., dissenting) (noting *Chambers* is contrary to holding in *Miller*). In an attempt to do so, the Court concludes monetary sanctions under the Court's inherent power *usually* must be premised on a specific factual finding of a direct causal link between the sanctionable conduct and the alleged harm. Only when the sanctionable conduct rises to a truly egregious level can all of the attorneys' fees incurred in the case be awarded. *Chambers*, 501 U.S. at 57. In less egregious cases, a court must tailor its award more carefully. *See, e.g.*, *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1111 (9th Cir. 2005) (affirming award of sanctions "designed to compensate [plaintiff] for unnecessary costs and attorney's fees"). Of course, there is no requirement that a court limit its sanctions award to the amount of attorneys' fees and costs because sanctions can be awarded for other types of harm incurred as a result of the sanctionable conduct. For example, sanctions can compensate a party for the "pain and suffering" caused by the sanctionable conduct. *See B.K.B. v. Maui Police Dept.*, 276 F.3d 1091, 1109 (9th Cir. 2002) (affirming award of

"compensatory damages" sanctions pursuant to court's inherent power due to "the embarrassment and pain suffered by Plaintiff" as a result of the sanctionable conduct).

Finally, under its inherent power the Court may award non-compensatory monetary sanctions "to vindicate the court's authority and deter future misconduct." *Miller*, 661 F.3d at 1030. But large non-compensatory monetary sanctions "are akin to criminal contempt and may be imposed only by following the procedures applicable to criminal cases, including appointment of an independent prosecutor, proof beyond a reasonable doubt and a jury trial." *Id.*

C. Non-Monetary Sanctions

In addition to monetary sanctions, courts imposing sanctions under their inherent power have a wide variety of other sanctions at their disposal. Courts have the inherent power to: vacate judgments, order dismissal of a suit, strike an answer and enter default judgment. *Chambers*, 501 U.S. at 45; *Thompson v. Housing Authority of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986) (inherent power includes power to "impose sanctions including, where appropriate, default or dismissal"); *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995) (dismissal pursuant to inherent powers); *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162 (9th Cir. 2012) (affirming order striking answer and entering default

judgment). But these type of sanctions are usually employed to vacate a fraudulently obtained judgment or where the litigation is ongoing. These sanctions are not a good fit for situations, such as the present one, where Plaintiffs have released their underlying claims and they do not wish to rescind that agreement. Because of that release, there are no pending claims which the Court could, for example, enter default judgment on.

III. Sanctionable Behavior

The troubling behavior by Goodyear and its counsel began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal. Without recounting the entire factual history already outlined, the following are the most egregious instances where Mr. Hancock, Mr. Musnuff, and Goodyear engaged in sanctionable behavior.

A. First Request for Production of Documents

One of the core arguments presented by Mr. Musnuff and Goodyear is that they had no further obligation to respond to Plaintiffs' First Request after they sent their objections and a small subset of responsive documents. This position is necessitated by the fact that there can be no serious dispute that the Heat Rise tests, the extended DOT tests, the crown durability test, and the bead durability test were all responsive to the First Request. Mr. Musnuff and Goodyear

have no choice but to claim the response to the First Request was appropriate. Mr. Musnuff and Goodyear also have to maintain that the First Request was withdrawn by Mr. Kurtz. Their arguments are not convincing and, in fact, it is now clear they did not adopt this position until they were faced with sanctions.

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs served their First Request shortly after the case began. (Doc. 59). That request sought "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." When responding to this request, Goodyear had two options. First, Goodyear could serve an objection to the request as a whole. Fed. R. Civ. P. 34(b)(2)(B). Second, Goodyear could serve an "objection to part of [the] request" *provided* it specified the part it was objecting to and it responded to the non-objectionable portions. Fed. R. Civ. P. 34(b)(2)(C). What Goodyear could not do, but what it did, was combine its objections with a partial response, without any indication that the response was, in fact, partial.[25] Goodyear apparently believes that its response to the First Request was sufficient to signal to Plaintiffs that other potentially responsive material was not being produced. This position finds absolutely no support in the Federal Rules, federal case law, or common sense.

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[25] It is especially troubling that Goodyear claimed its secretly partial response was being made "in a good faith spirit of cooperation."

The language of Rule 34 is clear. The rule states: "An objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). As clarified in the 1993 Advisory Committee notes, this language is meant to "make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions." The natural corollary of this is that any objection must identify the particular portion which is not being responded to on the basis of the objection. As stated in Moore's Federal Practice, "If the party objects to the production of an item or category in part rather than in its entirety, *the objection must specify the part to which the objection pertains.*" Moore's Federal Practice § 34.13(2)(b) (emphasis added). And in Federal Practice and Procedure: "The responding party may object to some or all of the discovery sought. In this case it must state, with respect to each item or category to which objection is made, the reason for the objections. *One who objects to part of an item or category should specify to which the objection is directed.*" Federal Practice and Procedure § 2213 (emphasis added). The plain language of Rule 34 requires a partial response be identified as such.

This plain language analysis is supported by case law. For example, in *Rodriguez v. Simmons*, 2011 WL 1322003, at *7 (E.D. Cal.), the plaintiff had served a Rule 34 request for medical records. The defendants served objections and indicated they had already produced some responsive documents. The court observed this response was inadequate. In the court's view, the

defendants had to "clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld" based on an objection. *Id.* It was especially critical if the documents existed but were being withheld that plaintiff "be made aware of this fact." *Id.* at *7 n.9. This would allow the parties to confer and attempt to resolve whether the unproduced documents should be produced prior to any court involvement.

Similarly, in *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, 2011 WL 939226, at *9 (D. Kan.), a defendant had produced documents "subject to" certain objections. The plaintiff believed this response was inappropriate because it was left "wondering whether all documents [had] been produced, or if some documents [were] still being withheld." *Id.* at *8. The court agreed the response was insufficient. The court observed the defendant could "object to part of a document request," but production "subject to" general objections was not permitted because such objections failed "to specify exactly what part of the document requests [was] being objected to." The failure to comply with Rule 34 left the plaintiff "guessing as to whether Defendant has produced all documents, or only produced some documents and withheld others." *See also GMAC Real Estate, LLC v. Joseph Carl Sec., Inc.*, 2010 WL 432318, at *1 (D. Ariz.) ("Objections must be in writing and identify the particular portions of the request subject to the objection; all other portions should be made available for inspection.").

Plain common sense also supports this reading of Rule 34. Were Goodyear correct that Rule 34 allows litigants to make undisclosed partial document productions, discovery would break down in practically every case. A litigant with *any* viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial and the opposing party would have no way of knowing the production was partial. Absent an indication of what, exactly, the responding party was objecting to, courts would have no way of assessing the propriety of the objections. Instead, courts would be flooded with motions to compel by litigants seeking to confirm that undisclosed responsive documents did not exist. And courts would then be forced to ask counsel, over and over again, "Do other documents exist?"

Accordingly, the plain language of Rule 34, case law, and common sense show Goodyear's response to the First Request was not complete or accurate. But Goodyear has other problems regarding the First Request in that the facts show its limited response was not made in good faith and Mr. Hancock, Mr. Musnuff, and Goodyear knew the responses were inadequate.

As is now clear, the Heat Rise tests, extended DOT tests, crown durability test, and bead durability test were performed on the *exact* tire at issue, were *directly* relevant to Plaintiffs' defect theory, and were performed around the *same time* other tests, which were produced, were performed. Goodyear claims that its

boilerplate objections in response to the First Request were appropriate, but it is clear no one made even a casual attempt to determine what responsive documents existed. There has been no acceptable explanation for Goodyear's belief that these tests were irrelevant or why Goodyear claimed that locating these tests would have been unduly burdensome. Thus, despite knowing the precise defect theory and issues presented in the case, Mr. Musnuff and Goodyear decided to make no effort to provide responsive documents. That decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith.

The record also establishes that Mr. Hancock and Mr. Musnuff knew Mr. Kurtz had not withdrawn his First Request. In fact, there is indisputable evidence that Mr. Hancock and Mr. Musnuff knew the First Request remained outstanding and supplementation was needed. Mr. Hancock and Mr. Musnuff's failure to produce the High Speed tests in a timely manner was a tactical decision made in bad faith in an attempt to prolong this litigation and multiply the proceedings. Mr. Hancock and Mr. Musnuff's decision not to produce the other tests, allegedly learned of in the context of other cases, was a bad faith attempt to hide responsive documents. Goodyear is equally responsible for this behavior because despite giving documents to Mr. Musnuff, Ms. Okey retained final approval authority on discovery responses. Therefore, Ms. Okey knew Goodyear was not cooperating in discovery and was engaging in bad faith behavior.

B. Third Request for Production of Documents

The response by Goodyear and its counsel to the Third Request is further proof of bad faith conduct. Plaintiffs' Third Request sought: "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). In response to this request, Mr. Hancock, Mr. Musnuff, and Goodyear eventually produced the High Speed tests. Waiting until a response to the Third Request was due was a bad faith attempt by Mr. Hancock, Mr. Musnuff, and Goodyear to prolong the litigation and make Plaintiffs incur additional costs. In particular, Mr. Hancock and Mr. Musnuff engaged in bad faith behavior by proceeding with Plaintiffs' expert's deposition before disclosing the High Speed tests.

In addition, Mr. Musnuff and Goodyear engaged in a bad faith attempt to conceal documents when they did not produce the Heat Rise tests or the other concealed tests in response to the Third Request. Mr. Musnuff and Goodyear had previously taken the position in other litigation that these tests were responsive to an almost identical discovery request. That is, the Heat Rise tests and other concealed tests were used by Goodyear to determine the G159's suitability for use on the highway. In fact, there is correspondence reflecting Mr. Musnuff and Goodyear employees knew the Heat Rise tests and other tests were responsive to the Third Request. (PSOF Ex. 24). There is no acceptable

justification for the failure to provide all responsive documents to the Third Request.

Finally, even accepting Mr. Hancock did not learn about the Heat Rise tests and other tests until the June 5, 2008 email in *Bogaert*, Mr. Hancock's failure to immediately correct his statements and the disclosures in the present case were motivated by a bad faith desire to keep the tests concealed.

C. Goodyear's 30(b)(6) Witness

In September 2007, Plaintiffs deposed Richard Olsen as Goodyear's 30(b)(6) witness. Prior to this deposition, the Court confirmed with Goodyear's counsel that Mr. Olsen would be speaking on behalf of Goodyear. (Doc. 243 at 29). During his deposition, Mr. Olsen was asked if there was "any separate testing" besides the tests Goodyear had produced. Mr. Olsen responded there were a "number of different test procedures" run during the development process but no documentation of those other tests was available. That was false.

The record is clear that Mr. Olsen knew about the Heat Rise tests as well as the crown durability test, bead durability test, and DOT endurance tests at the time of his deposition. The record is also clear that those tests still existed. Mr. Olsen made clear false representations when he stated otherwise. Because he was speaking on behalf of Goodyear, that means Goodyear made false representations. Fed. R. Civ. P. 30(b)(6) (corporation must designate person "to testify on its

behalf"). Mr. Olsen had an obligation to "review all corporate documentation" that was relevant to the deposition topics and it appears he did so as the summary in his files contains references to all the concealed tests. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001). His deposition testimony, therefore, can only be explained as *consistent misrepresentations* about the available testing. This easily qualifies as conduct tantamount to bad faith.[26]

D. Misleading In-Court Statements

Plaintiffs first requested Goodyear's testing data in September 2006. Goodyear, through its counsel, decided not to comply with its obligation to produce some of that testing data until June 2007. And it decided to withhold completely a wide variety of testing data. Therefore, any statement prior to June 2007 that Goodyear had produced all requested documents was false. On April 6, 2007, the Court asked whether Goodyear had "any internal documentation" that had been requested but not produced. Mr. Hancock responded

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[26] The Court recognizes that testimony by a 30(b)(6) witness may not absolutely bind "a corporate party to its designee's recollection." *See A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (finding 30(b)(6) testimony does not act as binding judicial admission). But Goodyear has not claimed Mr. Olsen simply made a mistake or was not aware of the other tests. Moreover, excusing this type of behavior based on its witness's faulty recollection would reward Goodyear for not adequately preparing that witness to discuss the very material topics identified in the deposition notice.

that it had produced all the requested documents. (Doc. 146 at 13). That was false. On May 17, 2007, the Court asked Goodyear "are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?"[27] Mr. Hancock responded that there were, but they had only been requested "last week." That was false.[28] Mr. Hancock also stated the tests would be produced in mid-June. Given the apparent plan to never produce the Heat Rise tests, this statement was misleading at best.

After Goodyear produced the High Speed tests, it continued to make untruthful statements to the Court. For example, on September 10, 2007, Mr. Hancock stated Goodyear had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). That was false. At a hearing on October 19, 2007, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). That was false. At that same hearing, Mr. Hancock also stated there were "no documents for [its 30(b)(6) witness] to be questioned about other than the documents that have been produced." That was false. And finally, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing on this tire. The original discovery request [was for]

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[27] The Heat Rise tests were conducted at 35 mph, meaning they were directly implicated by the Court's question.

[28] The tests had been requested in September 2006.

all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced." That was false.

Mr. Hancock now claims that he did not know these statements were false at the time they were made. For some of them, he is correct. But it should go without saying that *someone* must be responsible when an attorney makes these type of repeated false statements in Court. Mr. Hancock, Mr. Musnuff, and Goodyear seem to believe sanctions are inappropriate if there is a claim, however implausible, that the false statements can be attributed to communication breakdowns. That cannot be the case. The question is, who should be responsible?

It appears Mr. Hancock did not know of the Heat Rise tests, extended DOT test, bead durability test, and crown durability test until June 2008 when he learned of them in the context of the *Bogaert* case.[29] (PSOF Ex. 31). Therefore, the Court is sympathetic to his position that he should not be held responsible for certain statements he made after Mr. Musnuff and Goodyear knew about those tests and had made the decision not to disclose them. The problem is that Mr. Hancock did not correct the record when he subsequently learned these other tests existed. The *Haeger* case continued for approximately twenty-two months after he learned of these other tests. Accordingly, while his culpability is reduced, it is not purged.

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[29] Mr. Hancock knew of the High Speed tests long before they were produced.

As for Mr. Musnuff, he claims he was unaware of the in-court representations Mr. Hancock was making. That is not true. Mr. Hancock averred he "discussed any and all court appearances and discovery disputes with [Mr. Musnuff] both before and after such events." (Doc. 980-2 at 3). The Court finds this portion of Mr. Hancock's [sic] credible. Based on accepting that testimony, Mr. Musnuff was informed that Mr. Hancock was repeatedly representing in court that no further documents existed. Mr. Musnuff knew that other documents existed but he never corrected Mr. Hancock. That failure was a bad faith attempt to suppress the documents.

And as for Goodyear, its outside counsel and in-house counsel were, acting together, making materially false and misleading statements in court and withholding documents they knew to be responsive to discovery requests. Allowing Goodyear to escape the consequences of the statements made by its "freely selected agent[s] . . . would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent[s] and considered to have notice of all facts." *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962). Ms. Okey remained responsible for discovery responses and, ultimately, she remained responsible to keep informed regarding the conduct of this litigation and the representations Mr. Hancock was making in court.

IV. Amount and Apportionment of Sanctions

Plaintiffs will be directed to file documentation establishing the amount of attorneys' fees and costs incurred after Goodyear served its supplemental responses to Plaintiffs' First Request. Based on his relatively limited involvement, but in light of his repeated misstatements and his failure to correct the record once he learned his representations were false, Mr. Hancock will be held responsible for twenty percent of those fees and costs. Mr. Musnuff and Goodyear will be held jointly responsible for eighty percent of the fees. The Court makes this allocation decision based on its belief that Mr. Hancock is less culpable but Mr. Musnuff and Goodyear are equally culpable.

This allocation decision is, of necessity, somewhat imprecise. Goodyear and its attorneys adopted a strategy, implemented in this case to great effect, to resist all legitimate discovery, withhold *obviously* responsive documents, allow Plaintiffs and their experts to operate under erroneous facts, disclose small subsets of documents as late as possible, and otherwise attempt to turn this case based on a motor vehicle accident into an Arizona version of *Jarnydce and Jarndyce. Cf. United States v. Washington*, 573 F.3d 701, 709 (9th Cir. 2009) (citing Charles Dickens, *Bleak House* 3 (1853)). As observed earlier, it would be impossible to point to precise causal links between all the sanctionable behavior and the expenses incurred by Plaintiffs. In a case of repeated egregious conduct such as the present, the Court must be free to fashion an appropriate remedy. The Court has done so.

Goodyear will also be required to file a copy of this Order in any G159 case initiated after the date of this Order.[30] Based on Goodyear's history of engaging in serious discovery misconduct in every G159 case brought to this Court's attention, filing this Order in future G159 cases will alert plaintiffs and the courts that Goodyear has, in the past, not operated in good faith when litigating such cases. It will also serve as notice of the existence of certain tests Goodyear attempted to conceal in previous cases.

V. Spartan's Request for Sanctions

The final issue is whether to award sanctions against Mr. Hancock, Mr. Musnuff, and Goodyear in favor of Spartan. Over the years, Spartan was involved as a co-defendant in numerous G159 cases. Spartan believes the G159 test data recently revealed by Goodyear establishes "the tire would be indefensible in any action." (Doc. 1071 at 3). In particular, Spartan points to Goodyear representations that the G159 was appropriate for motor home use despite Goodyear's knowledge that the G159 operated at too high of temperature in that setting. (Doc. 1048 at 5). Based on Goodyear's misrepresentations, Spartan seeks to recover *all* the attorneys' fees and expenses it incurred as a result of G159 litigation it was involved in with Goodyear. It would be inappropriate to sanction Mr. Hancock, Mr. Musnuff, and Goodyear for actions taken

[30] Goodyear may apply to the court hearing the case to be excused from this requirement.

in other cases. Therefore, the only issue is whether Spartan should recover any expenses incurred in the present case.

Spartan did not serve any discovery in this case. Spartan did receive copies of the discovery papers provided by Plaintiffs and Goodyear, but Spartan has not pointed to *specific* evidence establishing when and how it relied on those discovery papers in formulating its actions in this case. Absent some evidence of a causal connection between misconduct and Spartan's defense, Spartan is not entitled to an award of fees in this case. Spartan likely would have a viable case of fraud against Goodyear based on Goodyear's misrepresentations, but that claim should be litigated in as [sic] separate action where Spartan can introduce evidence regarding all the G159 litigation it was involved in over the years.

Accordingly,

IT IS ORDERED the Motion for Sanctions (Doc. 938) is **GRANTED IN PART**.

IT IS FURTHER ORDERED the Motion for Hearing (Doc. 1034) is **DENIED**.

IT IS FURTHER ORDERED no later than December 14, 2012 Plaintiffs shall file their application for attorneys' fees as required by Local Rule.

DATED this 8th day of November, 2012.

/s/ Roslyn O. Silver
Roslyn O. Silver
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Leroy Haeger, et al., Plaintiffs, vs. Goodyear Tire and Rubber Co., et al., Defendants.	)	No. CV-05-02046-PHX-ROS **PROPOSED ORDER** (Filed Feb. 24, 2012)

Plaintiffs have filed a Motion for Sanctions. Based on an exhaustive review of the entire record, the following represent the Court's findings of fact and conclusions of law.

BACKGROUND

I. Facts of the Accident and Initial Proceedings

In June 2003, Leroy and Donna Haeger, along with Barry and Suzanne Haeger (collectively "the Haegers"), were traveling in a motor home owned by Leroy and Donna Haeger. That motor home was manufactured by Gulf Stream Coach ("Gulf Stream") on a chassis manufactured by Spartan Motors, Inc. ("Spartan"). The motor home had "G159" tires manufactured by Goodyear Tire and Rubber Company ("Goodyear"). While traveling on the highway, one of the motor home's front tires failed, resulting in the motor home leaving the road

and tipping over.[1] The Haegers suffered serious injuries as a result. The motor home was insured by Farmers Insurance Company.

In 2005, the Haegers and Farmers Insurance Company ("Farmers") sued Gulf Stream, Spartan, and Goodyear. The Haegers and Farmers alleged various product liability and negligence claims. (Doc. 13). Practically no discovery occurred before the parties' first disagreement arose. (Doc. 49). That disagreement centered on whether a protective order should include a provision allowing the Haegers' counsel to "share" information with other counsel litigating claims against Goodyear elsewhere in the country. (Doc. 49). In August 2006, the Court entered a protective order which did not contain a "sharing" provision. (Doc. 56). Shortly after that protective order, the Court issued its first scheduling order. (Doc. 58). The parties then began discovery in earnest.

II. Goodyear's Behavior During Discovery

In September 2006, the Haegers served their First Request for Production of Documents. (Doc. 59). Approximately thirty days later, Goodyear provided its responses followed not long after by supplemental responses. (Doc. 62, 63). Goodyear's supplemental responses started with sixteen "general objections." (Doc. 938-1 at 19). After those objections, Goodyear provided

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[1] The cause of the accident was never determined. Goodyear claimed it was due to driver error while the Haegers claimed it was due to the defective nature of the tire.

more specific objections for each request. Most relevant here is "Request for Production No. 14." That request was for: "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." Goodyear's response was as follows:

> RESPONSE: See General Objections. Goodyear objects to this Request for the reasons and on the grounds that it is Overly Broad, Unduly Burdensome and seeks Irrelevant and Confidential Information, seeks information about tires Not Substantially Similar, and Plaintiffs have identified No Defect Theory.
>
> SUPPLEMENTAL RESPONSE: Subject to and without waiving the foregoing objections, and in a good faith spirit of cooperation, Goodyear will produce, subject to the Protective Order entered in this case, the DOT test data for the Subject Tire for the Subject Time Frame.

(Doc. 938-1 at 24).

In December 2006, the parties notified the Court they had a discovery dispute regarding the permissible scope of discovery. (Doc. 97). In particular, the parties could not agree on the appropriate time frame for Goodyear's document productions. Goodyear believed it should not have to produce any information it received after the date of the accident while Plaintiffs believed Goodyear should have to produce such information. The Court held a hearing to address this disagreement on January 3, 2007. In explaining its

position, Goodyear's counsel Graeme Hancock made broad statements indicating that Goodyear had already produced a large amount of information: "We have produced all of the data we had as of the date of the accident so you can say [Goodyear] knew or should have known through negligence [of a problem], or that's enough data so that if there's some kind of problem in the production, it's obvious." (Doc. 116 at 33). Mr. Hancock went on to clarify that for certain questions in "the first set of interrogatories [and] in the first set of requests of production," Goodyear had no additional information than what it had already produced. (Doc. 116 at 33). Relying on Goodyear's representation that all of the information from before the accident had been produced, the Court heard and resolved the specific types of post-accident information that Goodyear would have to produce. (Doc. 116 at 34-35).

On April 6, 2007, the Court held a status conference. (Doc. 146). During that conference, the Court inquired whether the parties were on schedule to complete discovery by the applicable deadline. Plaintiffs' counsel represented he was on schedule. The Court then asked Mr. Hancock for his opinion on whether all discovery could be completed on time.

> The Court: Let me ask defense counsel, is there any internal documentation that is available that has been requested that your client has – clients have not provided?
>
> Mr. Hancock: You Honor, speaking on behalf of Goodyear, we have responded to all outstanding discovery and those responses have

> been outstanding for some time and, you know, if a document shows up, we'll of course produce it and supplement our answers but I think we're done or nearly done.

(Doc. 146 at 13).

On April 17, 2007, the parties filed a joint statement of discovery dispute. (Doc. 152). The discovery dispute involved Plaintiffs' attempts to obtain information from Gulf Stream and Spartan regarding other motor home accidents. Plaintiffs' counsel expressed his belief that this "tire was never tested above 30 miles an hour." (Doc. 201 at 48). Because of this statement, the Court asked a specific question of Goodyear's counsel and received an unequivocal response.

> The Court: Mr. Hancock, are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?
>
> Mr. Hancock: Yes, Your Honor.
>
> The Court: And they have been produced?
>
> Mr. Hancock: No, Your Honor. They have been requested from the plaintiffs in a Request for Production that arrived in my office I believe last week where the discovery response is due in mid-June. And they will be – I have requested them from my client and they will be produced at that time.
>
> The Court: All right. So Mr. Kurtz –
>
> Mr. Kurtz: Your Honor, if I may, we have, as have lawyers across the country, they have

> asked for these tests. My requests for these speed tests have been outstanding for well over a year and Mr. Hancock himself told me the reason they haven't been produced is because nobody can find them anywhere.
>
> The Court: Well, he's found them. He apparently has found them so you're going to have what you want.
>
> Mr. Kurtz: Well, I'll be looking forward to reading them but that won't change the issue, Your Honor. You know, I think – you know, this is discovery, Judge. We ought to be able to ask some questions and I'm pleased to provide the court with a detailed factual record about these. These are not things that I'm making up. They are not things that experts divined. They are tied to hard documents prepared by Goodyear.
>
> The Court: It seems to me that the issue has been narrowed after our lengthy conversation to the tests that have been used or were engaged in by Goodyear for the purpose of establishing for their purposes and for consumers that these tires could be used for – based upon the weight and pressure that they have indicated that they were or that they could hold for traveling above 75 or at 75 miles an hour.

(Doc. 201 at 48-49). After further discussion with counsel regarding the appropriate scope of discovery and depositions, the Court made sure Mr. Hancock understood his obligations.

> The Court: Is there any question in your mind, Mr. Hancock, what I am going to allow in terms of discovery? And that is the deposition questions that I will allow?
>
> Mr. Hancock: Your Honor, I believe the court is saying . . . my witnesses should be deposed about the [testing] done on this [specific] tire with respect to the speed in which it can be operated and what records they have, what records they don't have and what those records show?
>
> The Court: That's exactly right.
>
> Mr. Hancock: Thank you, Your Honor.

(Doc. 201 at 51).

The parties filed a notice of discovery dispute on June 1, 2007. (Doc. 225). That notice recounted a variety of disputes, including a dispute involving Plaintiffs' request that Goodyear provide a 30(b)(6) witness.[2] At the discovery dispute hearing, Plaintiffs began by explaining the main theory of their case:

> Mr. Kurtz: And the tire can't carry the weight of the motor home at [freeway] speed. And it causes the tire to degrade and fail. And we believe – and we're in the middle of this in this case – that that is part of the reason that we saw all these motor home failures with the

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[2] On May 11, 2007, Plaintiffs noticed a 30(b)(6) deposition of Goodyear. The subjects of that deposition were to include the "history of testing of the subject tire for speed capacity and weight capacity during the years of its production." (Doc. 175 at 4).

> G 159 tire, is that when they get up to freeway speed, they're just not put together to operate in that environment.

(Doc. 243 at 13).

The parties then discussed with the Court the 30(b)(6) issue. Plaintiffs' counsel described the proposed deposition topics as including "the design history of this tire" and "testing for speed and weight." (Doc. 243 at 21). The Court ruled that the 30(b)(6) deposition could occur. (Doc. 243 at 27). The Court also clarified with Goodyear's counsel that the witness would be speaking on behalf of Goodyear. (Doc. 243 at 29).

On June 21, 2007, Goodyear responded to Plaintiff's Third Request for Production of Documents. That request sought "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). Goodyear's response to this request was as follows:

> Subject to and without waiving the following objections, and in a good faith spirit of cooperation, Goodyear states that it is producing, subject to the Protective Order entered in this case, copies of electronically-maintained high-speed durability test results conducted on 275/70R22.5 G159 production tires since August 1996. After diligent search, to date Goodyear has not been able to locate additional paper records for the tests that are recorded electronically and it is believed that those paper records have been discarded pursuant to

> the Company's document retention practices. Also, after diligent search, to date, Goodyear has not been able to locate the paper records for the high-speed durability tests which it conducted on the 275/70R22.5 G159 tire prior to August 1996, which were not recorded electronically, and it is believed that those paper records have been discarded pursuant to the Company's document retention practices. Goodyear will supplement this response to produce these paper records if they are subsequently located.
>
> Goodyear objects to this Request for the reasons and on the grounds that it is overly broad, unduly burdensome, seeks irrelevant and confidential information.

(Doc. 938-1 at 36).

Around the same time Goodyear responded to Plaintiffs' Third Request for Production of Documents, the Court ordered the parties to "confer and set dates for all remaining depositions and discovery by June 26, 2007." (Doc. 251). On June 26, 2007, Plaintiffs filed a document stating the parties had complied with the Court's Order by establishing dates to complete discovery. Because a status hearing was scheduled for the near future, Plaintiffs' filing also addressed various discovery problems they were still having with Goodyear. According to Plaintiffs, Goodyear's June 21 disclosures were the "first time" it had disclosed "evidence which relates to the inability of the subject tire to operate at freeway speeds." Plaintiffs stated they were still waiting for Goodyear to produce additional testing

information and they requested the Court "inquire and determine whether additional testing data is in Goodyear's possession to assure that Goodyear's disclosures are complete." (Doc. 256 at 3).

On August 9, 2007, the parties filed a joint statement regarding the future of discovery. In that document, Plaintiffs stated they were still attempting "to gather information from Goodyear on the design and testing of this tire." (Doc. 301 at 5). In addition, Plaintiffs claimed "Goodyear did not produce any testing on the speed of the tire until June [21], 2007,[3] despite the fact such testing was requested in Plaintiffs' First Request to Produce on September 20, 2006." (Doc. 301 at 6). In response, Goodyear argued Plaintiffs were attempting to "distract[] the Court with a series of red herrings regarding as yet unpresented and inchoate discovery disputes." (Doc. 301 at 7). Goodyear did not provide any substantive response regarding its extremely late disclosure of testing data. Instead, Goodyear argued the discovery deadline had passed and requested the Court limit the amount of remaining discovery. Without addressing the testing data issue, the Court imposed new discovery deadlines. (Doc. 311).

On September 10, 2007, the parties submitted another joint statement of discovery dispute. (Doc. 319). Plaintiffs were seeking to brief the issue regarding the "proper scope of discovery." Plaintiffs also wished to present "information that Goodyear improperly

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[3] The exact date of Goodyear's disclosures in June 2007 is unclear.

withheld high-speed test data from the court." (Doc. 319 at 2). On the issue of test data, Goodyear responded that "Nothing suggests this Court has ever ordered production of any test data to it. Goodyear produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). The Court denied Plaintiffs' request to brief these issues and ordered the parties to comply with prior rulings regarding the appropriate scope of discovery. (Doc. 320).

On September 12, 2007, Plaintiffs deposed Richard Olsen. Mr. Olsen had been designated as Goodyear's 30(b)(6) witness. Mr. Olsen was asked about the "high speed" tests Goodyear performed on the tire prior to Goodyear determining it could be released as a tire able to perform at speeds up to 75 miles per hour. In particular, Mr. Olsen was given the four tests which had been turned over to Plaintiffs in June 2007 and was asked whether they constituted the entire universe of such tests.

> Mr. O'Connor (Plaintiffs' Counsel): To the best of your knowledge, [were] only these four high-speed tests available to Goodyear prior to rating this tire as a 75 mile an hour tire[?]
>
> ***
>
> Mr. Olsen: No.
>
> Mr. O'Connor: What other high-speed tests are available?
>
> Mr. Olsen: I think we talked at length this morning when we first started getting into the

high-speed test data that I've spoken with the people who were involved in the release of this tire, and they've confirmed to me that high-speed tests were run in the development process of this tire before it was released to production. We just don't have any paperwork available for that.

Mr. O'Connor: Okay. So there were tests run, but those have either been discarded or thrown away, and we don't have the results of those tests. Correct?

Mr. Olsen: We don't have them here today, but the people making the decision at that time likely had them available to them at that time.

Mr. O'Connor: Okay. So they had them available, apparently, in 1998 and have somehow discarded them since 1998. Is that what you're trying to tell me?

Mr. Olsen: I'm just saying that they're not available today.

Mr. O'Connor: Okay. So based on the record we have, we only know of four available high-speed tests that we can look at as to whether or not Goodyear could justify speed rating this tire at 75 miles an hour in June of 1998. Correct?

Mr. Olsen: We have four available today to us.

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> Mr. O'Connor: Okay. So there's any – any separate testing that would have been done on this car – on this particular tire, sir?
>
> Mr. Olsen: There's a number of different test procedures that are run in the development process of a new tire before it goes into production.
>
> Mr. O'Connor: Do we have any of those tests, sir?
>
> Mr. Olsen: I don't have them, no.
>
> Mr. O'Connor: Are they still available?
>
> Mr. Olsen: I don't believe so.

(Doc. 938-1 at 40-45).

Defense counsel then asked Mr. Olsen some questions based on a document previously examined during the deposition. That document described the high-speed test data produced by Goodyear:

> Defense Counsel: Okay. The – earlier on, the plaintiffs' counsel asked you about an exhibit . . . it is the test data for high-speed wheel tests performed on this tire. Do you have that?
>
> Mr. Olsen. Yes. . . .
>
> Defense Counsel: . . . There are other numbered tests that are not on the exhibit. Is that correct? Do you recall the testimony the plaintiffs' counsel asked you about saying, "Well, we don't have tests, for example, 4 through 7," that sort of thing?

Mr. Olsen: Yes, sir.

Defense Counsel: As far as you know, are all of the tests that were in the databases that were searched that were on the – this, the tire at issue in this case, this specification tire, in that database, in what you have there?

Mr. Olsen: Yes. They're all included here.

(Doc. 938-1 at40-47).

Based on Plaintiffs' dissatisfaction with Mr. Olsen's testimony, the parties submitted another joint statement of discovery dispute. One of the disputes centered on Plaintiffs' belief that Mr. Olsen "was not sufficiently knowledgeable" on various topics. (Doc. 345 at 1). Plaintiffs also claimed that Goodyear had not produced "all high-speed testing on the G159 tire and has improperly redacted responsive G159 high speed test results." Goodyear claimed it had "produced all 'high speed testing' data more than three months ago." (Doc. 345 at 3). Goodyear also represented that it had not redacted any tests but it had "simply omitted tests with other tires not at issue in the case, which were *not* part of Plaintiffs' request for the high speed tests ('any speed or endurance testing to determine that the subject tire was suitable for 75 mph highway purposes')." (Doc. 345 at 3). The Court held a hearing on these disputes on October 19, 2007. (Doc. 361).

At that hearing, Mr. Hancock made a number of unequivocal statements. Mr. Hancock averred that "Goodyear has searched for and produced all of the high-speed testing in its possession concerning the tire

that is at issue in this case." (Doc. 361 at 45). After the Court learned Mr. Olsen may not have been qualified to state that all high-speed testing data had been produced, the Court ordered Mr. Hancock to "ask [Mr. Olsen] just to make sure that . . . that everything that relates to the high-speed testing of this tire has been produced." Mr. Hancock responded: "I will do that, Your Honor. I will supplement our record. I believe that to be the case. I have checked with my client and confirmed that that is the case."[4] (Doc. 361 at 46). Mr. Hancock then went on to "flesh out the record." He stated

> Goodyear's normal document retention policy means we don't have those records anymore. These are not government-required tests. You don't keep them. . . . So there were tests done. Mr. Olsen can testify about those tests but there are no documents for him to be questioned about other than the documents that have been produced and we will supplement with direct confirmation of that.

(Doc. 361 at 47). After a break, Mr. Hancock affirmed that Plaintiffs had asked for "documents which relate to any speed or endurance testing to determine that the subject tire was suitable for 65 miles per hour." (Doc. 361 at 53). Mr. Hancock affirmed yet again that Goodyear

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[4] The record does not reflect whether Mr. Hancock asked Mr. Olsen about the high-speed tests but the record is clear that Mr. Hancock did not provide any additional test results after this discussion.

> has searched for and produced all of the high-speed testing on this tire. The original discovery request, which is how we got here, were all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced.

(Doc. 361 at 58-59). Mr. Hancock continued with "The discovery request is what did you rely on and tell the public that this tire could go 75 miles an hour? All of that testing has been produced. This tire goes out for sale and we produced all of the testing on any tire that was the same as any of the tires for sale." (Doc. 361 at 63).

III. Post-Discovery Activity

Discovery formally ended shortly after the October 2007 hearing and the parties began briefing dispositive motions. The dispositive motions involved a wide array of complicated issues which, for purposes of this Order, are irrelevant. While those motions were pending, Plaintiffs agreed to dismiss Gulf Stream. (Doc. 635). Eventually, the Court issued a lengthy order denying Plaintiffs' motion for summary judgment and denying in part and granting in part Goodyear's motion for summary judgment. (Doc. 651). The Court also granted Spartan's motion for summary judgment, dismissing Spartan from the case. (Doc. 652). Plaintiffs and Goodyear then prepared for trial by inundating the Court with motions in limine and other pretrial filings. The Court devoted substantial time and effort to

resolving those motions. (Doc. 842, resolving over thirty motions). On April 14, 2010, the first day of trial, Plaintiffs and Goodyear informed the Court they had reached a settlement. (Doc. 926). As a result, the case was closed.

IV. Plaintiffs' Counsel Writes to Goodyear About Undisclosed Tests

On January 6, 2011, Plaintiffs' counsel wrote to Goodyear's counsel and stated he had "great concern regarding the adequacy and honesty of the disclosures made" in this case. (Doc. 938-1 at 49). This concern was based on information produced in another case involving a G159 tire. In that other case, Goodyear had produced "internal heat test records." Plaintiffs' counsel observed that no such data was produced in this case and he asked whether such records actually exist. In response, Goodyear's counsel stated "Goodyear stands behind its discovery responses in the *Haeger* case, and we stand behind the properly-stated objections to the scope of the discovery requests propounded by the plaintiffs in this case." (Doc. 938-1 at 53). Plaintiffs' counsel then emailed Goodyear's counsel, asking for a direct answer whether "internal heat test records" existed. (Doc. 938-1 at 56). Goodyear's counsel responded that it would not be "productive to debate these issues further." (Doc. 938-1 at 56).

Plaintiffs' counsel sent a follow-up letter, which Goodyear's counsel responded to by claiming Plaintiffs' allegations were "unprofessional and without merit."

(Doc. 938-1 at 66). Goodyear's counsel stated Goodyear had "abided by all of Judge Silver's rulings and we take issue with any suggestion that we were disrespectful or misled the court in any manner or that we failed to comply with any of her rulings in this case." Goodyear's counsel admitted "it is true there are testing records regarding the [G159] tire that were not produced in the *Haeger* litigation. That fact was clear during the course of the litigation, and certainly at the time plaintiffs chose to resolve this case." (Doc. 938-1 at 66).

V. Plaintiffs File a Motion for Sanctions

On May 31, 2011, Plaintiffs filed a motion for sanctions based on alleged "discovery fraud." (Doc. 938). Goodyear opposed the motion, primarily arguing it was too late for Plaintiffs to seek discovery sanctions. (Doc. 948). Goodyear was ordered to produce the testing records at issue and Plaintiffs filed a reply explaining the importance of those records. (Doc. 954, 963). Spartan subsequently joined the motion for sanctions, arguing it also suffered harm as a result of Goodyear's alleged misconduct. (Doc. 966).

VI. Explanation of Undisclosed Test Results

An explanation of the undisclosed test results shows how they were relevant to this case. The tests are titled "Laboratory Durability Testing – Heat Rise" and were conducted on four G159 tires on April 21, 1996. The tests were meant to "determine the dynamic heat build-up at specific loads, speeds, and inflations."

The tests were conducted on a "67.23 [inch] diameter flywheel." The tests consisted of running the tires at 35 miles per hour and checking the temperature of the tire at certain intervals. The tests describe 35 miles per hour as reflecting "highway use." Even though 35 miles per hour seems substantially slower than highway speeds, the rationale for this description is explained by Goodyear's 30(b)(6) witness. Testing a tire on a 67-inch flywheel places "upwards of double the speed" impact on a tire as the tire impact of "a vehicle on a road surface." In other words, "if you run 45 miles an hour on the steel flywheel [that] is the equivalent temperaturewise of 70, 80 miles an hour on the public highway as far as the heat history goes." (Doc. 963-1 at 61). Under this logic, testing tires at 35 miles per hour on a flywheel would be the equivalent of 55-65 miles per hour on the highway.

According to the results, after running at 35 miles per hour, the G159 tires generated temperatures of up to 229 degrees. Goodyear's internal documents, own expert, and 30(b)(6) witness all agree that this temperature is high and would be cause for concern. Thus, if these tests had been disclosed Goodyear's defense would have been severely compromised; it would have been difficult, if not impossible, for Goodyear to claim the G159 was suitable for use on a motor home given its own testing data that G159 tires reached temperatures well above 200 degrees at speeds of 55-65 miles per hour.

ANALYSIS

I. Standard for Awarding Sanctions

Given that this case was dismissed pursuant to the parties' agreement, there are two possible bases for imposition of sanctions against Goodyear and its counsel: 28 U.S.C. § 1927 and the Court's inherent power.[5] As set out below, sanctions are appropriate under both.

A. 28 U.S.C. § 1927 Cannot Reach Goodyear's Conduct

Pursuant to 28 U.S.C. § 1927, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court

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[5] Sanctions pursuant to Federal Rule of Civil Procedure 11 should ordinarily be imposed before the case is closed. *See* Moore's Federal Practice § 11.22(2)(a) ("[T]he court should ordinarily impose [Rule 11] sanctions before issuing a final order."). The Court notes, however, that the behavior by Goodyear's counsel raises serious Rule 11 concerns. For example, on October 15, 2007, Mr. Hancock stated in a written submission that "Goodyear produced all 'high speed testing' data . . . more than three months ago." (Doc. 345 at 3). Given the underlying facts, it appears this statement could not have been "formed after an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b). At that point in time, the request for testing had been outstanding for well over a year and it seems unlikely, although possible, that Mr. Hancock did not know about the undisclosed test results. As explained in the Rule 11 Advisory Committee Notes, if a party has had time to conduct an investigation and does not have evidentiary support for a particular factual contention, "the party has a duty under the rule not to persist with that contention." This case now appears to contain numerous instances of Mr. Hancock persisting with factual contentions regarding testing data in violation of Rule 11.

to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Under this statute, an attorney's conduct is sanctionable only if it multiplies the proceedings in both an "unreasonable and vexatious manner." *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002). In addition, an attorney must have acted in bad faith or engaged in conduct tantamount to bad faith. *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000) ("The imposition of sanctions under § 1927 requires a finding of bad faith."). But this statute allows for sanctions *only* against "an attorney or otherwise admitted representative of a party." *F.T.C. v. Alaska Land Leasing, Inc.*, 799 F.2d 507, 510 (9th Cir. 1986). Therefore, any sanctionable conduct by Goodyear itself is beyond the reach of § 1927.

B. The Court's Inherent Power Can Reach Both Goodyear And Counsel

"Under its inherent powers, a district court may . . . award sanctions in the form of attorneys' fees against *a party or counsel* who acts in bad faith, vexatiously, wantonly, or for oppressive reasons." *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006) (emphasis added). But "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). Thus, as with sanctions under Section 1927, before awarding sanctions under its inherent power, the

Court "must make an express finding that the sanctioned party's behavior constituted or was tantamount to bad faith." *Id.*

C. Definition of Bad Faith

A comprehensive definition of "bad faith" or conduct "tantamount to bad faith" is not possible but the type of conduct at issue "includes a broad range of willful improper conduct." *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). Such conduct includes "delaying or disrupting the litigation or hampering enforcement of a court order." *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997). In addition, "willful disobedience of a court's order," actions constituting a "fraud" upon the court, or actions that defile the "very temple of justice" are sufficient to support a bad faith finding. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991). And "recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose" is sufficient. *Fink*, 239 F.3d at 994. Thus, "reckless misstatements of law and fact, when coupled with an improper purpose" can establish bad faith. *Id. See also Malhiot v. S. Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (knowing false statements of fact or law establish bad faith).

D. Appropriate Type Of Sanctions

At issue in this case are a variety of actions which, when viewed together, represent attempts by Goodyear and its counsel to mislead Plaintiffs and the Court

and to thwart the resolution of this case on the merits. In particular, Goodyear's discovery practices, numerous statements in court filings, and in-court statements show Goodyear and its counsel acted in bad faith or engaged in conduct tantamount to bad faith.

The misconduct at issue appears to have stemmed from a deliberate corporate strategy adopted by Goodyear to prevent the disclosure of the internal heat test results. This is supported by the fact that Goodyear's 30(b)(6) witness did not disclose the test results and even testified that they did not exist. Also, Goodyear apparently did not disclose these test results in other cases pending across the country. Because section 1927 sanctions cannot be imposed on Goodyear, the Court's inherent power is the appropriate vehicle for sanctioning Goodyear for its misconduct. *See Chambers*, 501 U.S. at 50 ("[I]f in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

The sanctioning of Goodyear's counsel, however, is possible under Section 1927.[6] Goodyear's counsel made repeated statements that, on the present record, appear misleading and often simply false. These statements "multiplie[d] the proceedings . . . unreasonably and vexatiously" by requiring the parties to brief, and the Court to resolve, countless discovery disputes. 28 U.S.C. § 1927. Counsel's statements were potentially made in either subjective bad faith or, at the very least,

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[6] When possible, courts should use means of imposing sanctions other than their inherent power. *Chambers*, 501 U.S. at 50.

recklessness with the improper purpose of hiding otherwise discoverable documents. In these circumstances, the Court has a "duty to examine the charge of unethical behavior [by counsel] and impose the necessary sanctions." *Erickson v. Newmar Corp.*, 87 F.3d 298, 303 (9th Cir. 1996).

II. Inappropriate Discovery Responses and 30(b)(6) Deposition

The troubling behavior by Goodyear and its counsel began almost immediately after the case was filed and continued throughout the pretrial proceedings. That behavior included inappropriate responses to requests for production as well as false testimony by Goodyear's 30(b)(6) witness.

A. First Request for Production of Documents

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs served their First Request for Production of Documents ("First Request") shortly after the case began. (Doc. 59). That request sought "All test records for the G159 tires, including, but no (sic) limited to, road tests, wheel tests, high speed testing, and durability testing." When responding to this request, Goodyear had two options. First, Goodyear could serve an objection to the request as a whole. Fed. R. Civ. P. 34(b)(2)(B). Second, Goodyear could serve an "objection to part of [the] request" *provided* it specified the part

it was objecting to and it responded to the non-objectionable portions. Fed. R. Civ. P. 34(b)(2)(C). What Goodyear could not do, but that which it did, was combine its objections with a partial response, without any indication that the response was, in fact, partial.[7] Goodyear apparently believes that its response to the First Request was sufficient to signal to Plaintiffs that other potentially responsive material was not being produced. This position finds no support in the Federal Rules, federal case law, or commonsense [sic].

The language of Rule 34 is clear. The rule states "An objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(C). As clarified in the 1993 Advisory Committee notes, this language is meant to "make clear that, if a request for production is objectionable only in part, production should be afforded with respect to the unobjectionable portions." The natural corollary of this is that any objection must identify the particular portion which is not being responded to on the basis of the objection. As restated in Moore's Federal Practice, "If the party objects to the production of an item or category in part rather than in its entirely, *the objection must specify the part to which the objection pertains.*" Moore's Federal Practice § 34.13(2)(b) (emphasis added). And in Federal Practice and Procedure: "The responding party may object to some or all of the discovery sought. In this case it must state, with respect

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[7] It is especially troubling that Goodyear claimed its secretly partial response was being made "in a good faith spirit of cooperation."

to each item or category to which objection is made, the reason for the objections. *One who objects to part of an item or category should specify to which the objection is directed.*" Federal Practice and Procedure § 2213 (emphasis added). The plain language of Rule 34 requires a partial response be identified as such.

This plain language analysis is supported by case law. For example, in *Rodriguez v. Simmons*, 2011 WL 1322003, at *7 (E.D. Cal.), the plaintiff had served a Rule 34 request for medical records. The defendants served objections and indicated they had already produced some responsive documents. The court observed this response was inadequate. In the court's view, the defendants had to "clearly state that responsive documents do not exist, have already been produced, or exist *but* are being withheld" based on an objection. *Id.* It was especially critical if the documents existed but were being withheld that plaintiff "be made aware of this fact." *Id.* at *7 n.9. This would allow the parties to confer and attempt to resolve whether the unproduced documents should be produced prior to any court involvement.

Similarly, in *Pro Fit Mgmt., Inc. v. Lady of Am. Franchise Corp.*, 2011 WL 939226, at *9 (D. Kan.), a defendant had produced documents "subject to" certain objections. The plaintiff believed this response was inappropriate because it was left "wondering whether all documents [had] been produced, or if some documents [were] still being withheld." *Id.* at *8. The court agreed the response was insufficient. The court observed the defendant could "object to part of a document request,"

but production "subject to" general objections was not permitted because such objections failed "to specify exactly what part of the document requests [was] being objected to." The failure to comply with Rule 34 left the plaintiff "guessing as to whether Defendant has produced all documents, or only produced some documents and withheld others." *See also GMAC Real Estate, LLC v. Joseph Carl Sec., Inc.*, 2010 WL 432318, at *1 (D. Ariz.) ("Objections must be in writing and identify the particular portions of the request subject to the objection; all other portions should be made available for inspection.").

Commonsense [sic] also supports this reading of Rule 34. Were Goodyear correct that Rule 34 allows litigants to make undisclosed partial document productions, discovery would break down in practically every case. A litigant with *any* viable objection to a discovery request would make that objection and then produce whatever portion of otherwise responsive documents it wished to produce. Under this approach, a party would have no obligation to indicate that its production was partial and the opposing party would have no way of knowing the production was partial. Courts would then be flooded with motions to compel by litigants seeking to confirm that undisclosed responsive documents did not exist. The courts would have no way of assessing the propriety of the objections because there would be no indication what, exactly, the responding party had objected to and whether there were other responsive documents being withheld.

Finally, even if the plain language, case law, and commonsense [sic] were not enough to show Goodyear's response to the First Request was lacking, there was no good faith basis for Goodyear's objections to the First Request. The internal heat tests were performed on the *exact* tire at issue, they were *directly* relevant to Plaintiffs' defect theory, and they were performed at the *same time* other tests, which were produced, were performed. There is no doubt that had the Court been presented with a motion to compel regarding the internal heat tests, that motion would have been granted. Goodyear's response show [sic] bad faith or conduct tantamount to bad faith.

B. Third Request for Production of Documents

Plaintiffs' Third Request for Production of Documents ("Third Request") sought "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). Goodyear's response was, yet again, misleading. Goodyear unilaterally decided that this request sought "high speed durability test results." (Doc. 938-1 at 36). Goodyear then produced the "high speed durability test results" it had, but also objected to the request as "overly broad, unduly burdensome, [and] seeks irrelevant and confidential information." (Doc. 938-1 at 36). These objections apparently served as the basis for not producing the "Laboratory Durability Testing – Heat Rise" test results. Again, Goodyear apparently believes the onus

was on Plaintiffs to conclude that Goodyear's responses indicated other documents *did* exist and Plaintiffs should have sought Court assistance to obtain those documents. As explained above, this position is not the one mandated by Rule 34.

In addition, there was no good faith basis for Goodyear to refuse to produce the heat test results in response to the Third Request. In fact, Goodyear's refusal to produce the heat test results in response to the Third Request was even less justified than its failure to produce the test results in response to the First Request. The Third Request was sufficiently narrow that Goodyear finally decided to produce the "high speed durability tests results." It is impossible to read the Third Request as covering the test results Goodyear did produce but excluding the heat test results it *did not* produce. The heat test results were responsive to the Third Request and had the issue been presented to the Court, Goodyear would have been ordered to produce the results as relevant evidence.

Goodyear's carefully crafted response to the Third Request was an attempt to give the impression that there were no documents other than those being produced. The present record establishes Goodyear's behavior was done in bad faith or constituted conduct tantamount to bad faith.

C. Goodyear's 30(b)(6) Witness

In September 2007, Plaintiffs deposed Richard Olsen as Goodyear's 30(b)(6) witness. Prior to this deposition, the Court confirmed with Goodyear's counsel that Mr. Olsen would be speaking on behalf of Goodyear. (Doc. 243 at 29). During his deposition, Mr. Olsen was asked if there were any other "high-speed tests" in addition to the ones Goodyear had produced. Mr. Olsen responded there were not. (Doc. 938-1 at 40-45). That was false. Mr. Olsen was also asked if there was "any separate testing" besides the tests Goodyear had produced. Mr. Olsen responded there were a "number of different test procedures" run during the development process but no documentation of those other tests was available. That was false.

While it was possible Mr.. Olsen simply was unaware of the undisclosed heat tests, the present record provides no explanation for Goodyear proffering a witness who was not sufficiently knowledgeable. Regardless of whether Mr. Olsen was being knowingly untruthful, at the time of his deposition he was speaking on behalf of Goodyear. Fed. R. Civ. P. 30(b)(6) (corporation must designate person "to testify on its behalf"). Therefore, Mr. Olsen had an obligation to "review all corporate documentation" that was relevant to the deposition topics. *Calzaturficio S.C.A.R.P.A. s.p.a. v. Fabiano Shoe Co., Inc.*, 201 F.R.D. 33, 37 (D. Mass. 2001). Given that other tests *were* available, Mr. Olsen's statement that other tests did not exist was an affirmative misstatement of fact by Goodyear and

establishes bad faith or is conduct tantamount to bad faith.[8]

III. Mr. Hancock's Misleading Statements

Goodyear's behavior during discovery is sufficient to support an award of sanctions under the Court's inherent power. In addition, Mr. Hancock's in-court statements qualify as evidence of additional misconduct.[9] Those statements show *clear and repeated* attempts to mislead Plaintiffs and the Court.

Plaintiffs first requested Goodyear's testing data in September 2006. Goodyear decided not to comply with its obligation to produce its testing data until June 2007. Therefore, any statement prior to June 2007 that Goodyear had produced all requested documents was false. For example, on January 3, 2007, Mr. Hancock stated it had produced all information responsive to the first set of requests of production. (Doc. 116 at 33). That was false. On April 6, 2007, the Court

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[8] The Court recognizes that testimony by a 30(b)(6) witness may not absolutely bind "a corporate party to its designee's recollection." *See A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001) (finding 30(b)(6) testimony does not act as binding judicial admission). But Goodyear has not claimed Mr. Olsen simply misspoke or was not aware of the other tests. Moreover, excusing this type of behavior based on its witness's faulty recollection would reward Goodyear for not adequately preparing that witness to discuss the topics identified in the deposition notice.

[9] Even viewed charitably, Goodyear's discovery practices ignored the longstanding proposition that the "discovery process is subject to the overriding limitation of good faith. *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242, 1246 (9th Cir. 1981).

asked whether Goodyear had "any internal documentation" that had been requested but not produced. Mr. Hancock responded that it had produced all the requested documents. (Doc. 146 at 13). That was false. On April 17, 2007, the Court asked Goodyear "are there any tests that are available to show when this tire was tested for speeds above 30 miles an hour?" Mr. Hancock responded that there were, but they had only been requested "last week." That was false.[10] Mr. Hancock also stated the tests would be produced in mid-June. Given the apparent plan to never produce the internal heat test results, this statement was misleading at best.

After Goodyear produced the limited testing data, it continued to make untruthful statements to the Court. For example, on September 10, 2007, Mr. Hancock stated Goodyear had "produced all the high speed test data on this tire in its possession in a timely response to Plaintiff's Third Request for Production." (Doc. 319 at 5). That was false. At a hearing on October 19, 2007, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing in its possession concerning the tire that is at issue in this case." (Doc. 361 at 45). That was false. At that same hearing, Mr. Hancock also stated there were "no documents for [its 30(b)(6) witness] to be questioned about other than the documents that have been produced." That was false. And finally, Mr. Hancock stated Goodyear had "searched for and produced all of the high-speed testing on this tire. The original discovery

[10] The tests had been requested in September 2006.

request [was for] all documents which relate to any speed testing to determine that the tire was suitable for highway purposes. All of that has been produced." That was false.

Mr. Hancock and Goodyear might believe these repeated misstatements can be justified because, based on Goodyear's own undisclosed definition, the internal heat tests did not qualify as "high-speed tests." There are two problems with this position. First, Plaintiffs' discovery requests were not for "high-speed tests." The Third Request for Production of Documents sought "All documents which relate to any speed or endurance testing to determine that the subject tire was suitable for [65 and 75] mph highway purposes." (Doc. 938-1 at 17). The internal heat test results are from a test Goodyear itself identified as "highway testing." Such test results are *obviously* responsive. In fact, the Court is confident that if the internal heat tests had shown the tire *did not* have heat problems, Goodyear would have produced it during discovery in response to Plaintiffs' requests. It was only because the test results were so damning that Goodyear choose to withhold the results.

The second problem with Goodyear relying on its own highly specific definition of "high-speed testing" as a justification for withholding the heat test results is that not all of its misstatements were made in the specific context of "high-speed tests." In other words, even if the Court were to accept Goodyear's untenable position that the internal heat test results were not "high-speed tests," there is still unequivocal evidence of misconduct. The most stark example of this came in

April 2007 when the Court asked whether Goodyear had "any tests . . . for speeds *above 30 miles an hour*?" (Emphasis added). Mr. Hancock responded Goodyear did have such tests and those tests would be produced. But the undisclosed tests were conducted at *35 miles per hour* and were not produced. Even under an implausibly generous interpretation of "high-speed testing," Mr. Hancock still materially misrepresented the facts.[11] Mr. Hancock's repeated falsehoods represent instances of subjective bad faith or recklessness with the improper purpose of thwarting discovery.

The Court is aware that the vicissitudes of representing a client can lead an attorney to zealously, but unknowingly, make representations that are false. The Court reserves ruling on whether counsel's behavior was undertaken in subjective bad faith or mere recklessness with an improper purpose.

IV. Goodyear's Post Litigation Conduct

Goodyear's national counsel made a statement in a letter to Plaintiffs' counsel the Court must specifically address. According to Goodyear's counsel, it was "clear during the course of the litigation" that Goodyear had chosen not to produce the internal heat test results. (Doc. 938-1 at 66). There is no plausible way to

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[11] This statement represented a breach of counsel's "duty of good faith and candor in dealing with the judiciary." *United States v. Associated Convalescent Enters. Inc.*, 766 F.2d 1342, 1346 (9th Cir. 1985).

read the record as supporting this contention. It certainly was *not* clear to the Court that Goodyear was withholding documents regarding the G159's performance in "highway" testing. Had it been "clear" to the Court what Goodyear and its counsel were doing, the Court would have immediately ordered disclosure and imposed sanctions for misconduct. To claim this Court would *knowingly* allow Goodyear to withhold relevant and discoverable information is outrageous. In addition, the claim by Goodyear's counsel that Plaintiff's allegations were "unprofessional and without merit" is preposterous on this record. (Doc. 938-1 at 66).

V. Appropriate Scope of Sanctions

> What above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2274 (2009) (Scalia, J., dissenting). Given the behavior by Goodyear and its counsel, the Court must impose sanctions. Unfortunately, the present record does not indicate who is responsible for each instance of misconduct nor does it indicate the appropriate amount to be awarded. The amount and allocation of the sanctions will be determined after further briefing by the parties.

RECORD AND BRIEFS

No. 15-1491

In The

Supreme Court of the United States

BASIL J. MUSNUFF,

Petitioner,

v.

LEROY HAEGER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where, contrary to Petitioner's assertions, the Ninth Circuit did not adopt a "no-causal-link rule," but instead expressly held that Petitioner's bad faith conduct "*caused* significant harm in forcing the Haegers to engage in sham litigation," and the Ninth Circuit even carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded" (App. 33 (emphasis added)), thereby embracing this Court's prior determination in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (awarding full attorney fees due to the frequency and severity of the misconduct).

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the district court's reliance on its inherent power is consistent with this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), and the bad faith misconduct was not discovered until after the case was settled.

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INTRODUCTION

The underlying proceedings and resulting decisions by the district court and the Ninth Circuit address carefully-orchestrated fraud involving years of willful deceptions, including bad faith discovery conduct, repeated misrepresentations to the court and the Haegers, and false deposition testimony during discovery – all of which reduced the litigation to a charade, but none of which was discovered until after the case had been settled. These deceptions concealed, for the entire five years of litigation, critically-important test data which the Haegers had requested regarding the Goodyear G159 tire, and sent the Haegers on a completely misdirected frolic. The district court found these deceptions so extensive that they "permeated the entirety of this case," App. 65, and the Ninth Circuit agreed that Petitioner's misconduct "caused significant harm in forcing the Haegers to engage in sham litigation and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses." App. 33.

During more than two years of post-settlement, sanctions-related litigation in the district court, Goodyear and its lawyers – including this Petitioner Basil Musnuff – filed fifteen briefs, participated in discovery and presented testimony at a six-hour evidentiary hearing. After that thorough process, the district court painstakingly detailed in a 66-page order a long list of sanctionable misconduct, which "continued throughout the entire litigation, including post-dismissal." App. 179; *see generally* App. 93-194. The order included

49 pages of findings of fact and 17 pages of legal analysis and conclusions. App. 7.

Ultimately, relying upon the date of the first definitive proof that Goodyear was treating litigation as a game of hide and seek, the district court held that "the most appropriate sanction is to award Plaintiffs [the Haegers] *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request."[1] App. 171 (emphasis in original). The court found Musnuff jointly responsible (along with Goodyear) for 80% of that amount, or $2,192,960.93. App. 170-71, 191.

The Ninth Circuit unanimously upheld the district court's findings that Goodyear and its attorneys engaged in bad faith, sanctionable misconduct. App. 20 ("the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case"); App. 47-48 (Watford, J., dissenting) (stating that the district court "approached the task . . . with great thoroughness and care," and "I agree with the majority that the district court's misconduct findings are supported by the record"). The panel also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 23 ("We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the

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[1] Goodyear's supplemental responses were provided on November 1, 2006, seventeen months after the suit was commenced. App. 100. The district court rejected the Haegers' request that all fees be awarded for the entirety of the litigation which commenced in 2005. App. 171, 191.

conduct at issue in this case"); App. 48 (Watford, J., dissenting) ("The district court's finding of bad faith authorized it to levy sanctions under its inherent power.").

Musnuff has presented no compelling reasons for granting its petition. *See* Sup. Ct. R. 10. He first asserts that the Ninth Circuit erred by "abandoning the critical element of causation." Petition at 21. But that assertion is simply not true. The Ninth Circuit not only expressly found that the element of causation had been fully satisfied, but it also carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded." App. 33 (emphasis added). Moreover, Musnuff fails to disclose in his petition that Musnuff (and the other sanctionees) admitted in the district court that approximately $2,018,794 of the fee award was directly linked to the years of misconduct. ER 1352, 1389. That admission resulted in an alternative, contingent award which effectively moots most of Musnuff's causation argument.

Musnuff also asserts that the Ninth Circuit erred by relying on inherent power to sanction him, rather than Fed. R. Civ. P. 37, which rule he characterizes as "the only basis" for possible sanctions. Petition at 22. But this assertion does not warrant the Court's review because Rule 37 could not apply to most of the categories of misconduct for which sanctions were imposed, because (among other reasons) the misconduct was not discovered until after the case had settled. App. 7-8. In any event, this Court has held that a court may resort to its inherent power even when the conduct could also

be sanctioned under the rules. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.").

Accordingly, this Court's review is unwarranted, and the Petition should be denied.

STATEMENT OF THE CASE

Even though the district court's findings of fact must be accepted as true on review unless clearly erroneous, *see Amadeo v. Zant*, 486 U.S. 214, 225-26 (1988) ("where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"), Musnuff improperly disregards the district court's findings. Instead (without even arguing that the district court's findings are clearly erroneous), Musnuff presents his own, one-sided and highly selective version of the facts, which the district court already rejected. Indeed, the district court specifically found that many aspects of Musnuff's version of the facts are unreasonable, not credible and even untruthful.[2]

[2] For example, in an effort to justify Goodyear's objections to the Haegers' first discovery requests (which objections the district court found were "not made in good faith," App. 183), Musnuff asserts that the Haegers did not state their defect theory in this case

Even Musnuff's two questions presented in his Petition are expressly premised on a misrepresentation that the sanctions were imposed merely for "non-disclosure of documents." Petition at i. However, the district court found numerous instances of misrepresentations to the court, false deposition testimony, frivolous deceptive declarations, a dizzying array of deceptions in filings and multiple willful misrepresentations during the evidentiary hearing. App. 93-192. Accordingly, most of Musnuff's assertions of fact are contrary to the actual, controlling facts.

The Haegers commenced this action against Goodyear in June 2005, alleging that defects in the design of Goodyear's G159 tire resulted in a motor home accident which caused severe harm to the Haegers. App. 8. Goodyear was represented by Basil Musnuff ("Musnuff") (an attorney with Roetzel & Andress, LPA, who acted as lead trial counsel and national coordinating counsel for all G159 cases throughout the country between 2003 and 2010), and Graeme Hancock ("Hancock") (an attorney with Fennemore Craig, P.C., who served as local counsel for Goodyear). App. 8. Goodyear

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until January 2007. Petition at 4. But the district court specifically rejected this "fact," finding that the representations "that Plaintiffs did not state the legal theory of this case until January 7, 2007 is incorrect . . . and now appears to have been part of a general strategy to obstruct and delay discovery," "despite knowing the precise defect theory and issues presented in the case, Mr. Musnuff . . . decided to make no effort to provide responsive documents" and "[t]hat decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith." App. 97 n.5, 184.

was embroiled in G159 tire litigation commencing in 1999. App. 1126-27, n.13.

The Haegers' case theory was that, when the G159 tire is used on motor homes at highway speeds, the tire produces a level of heat which it was not designed to endure, leading to tire failure. App. 9-10. The Haegers repeatedly requested production of test data which would have revealed the operating temperature of the tire. App. 95-96, 99-102, 110, 117-18, 121-23. None was disclosed. When Goodyear and its attorneys were later forced to produce the concealed tests during the sanction proceedings, the tests revealed that Musnuff knew the tire was generating temperatures far in excess of 200 degrees at highway speeds. Evidence of temperatures above 200 degrees would have transformed this litigation because Goodyear's experts had admitted (knowing that Goodyear and its attorneys had concealed the damning test data) that "anything over 200 [degrees] could cause separation." App. 162-63.

Thus, the egregious misconduct of Goodyear and its attorneys deprived the Haegers of the crucial temperature evidence supporting their claims. Consequently, after five years of litigation based on a false set of facts Goodyear and its attorneys had created, resulting in completely misguided discovery, misdirected expert disclosures and wholly wasted motion practice, the Haegers and Goodyear reached a settlement on April 14, 2010. App. 14.[3]

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[3] Prior to the sanctions the parties filed 163 motions. App. 169.

Sometime after the settlement, the Haegers' counsel saw an article stating that Goodyear had produced in a Florida suit internal heat and speed testing related to the G159 tire which the Haegers had repeatedly requested but never received. App. 14. Goodyear eventually admitted that it had not disclosed the requested tests, but Goodyear and its attorneys attempted to justify that concealment with "a dizzying array of misstatements and simple falsehoods." App. 154.

On May 31, 2011, the Haegers filed a motion for sanctions. App. 15. After that motion had been fully briefed, the district court found that there were "serious questions regarding [Goodyear's] conduct in this case," and ordered Goodyear to produce "the test results at issue." App. 15. Even then, Goodyear disclosed only a single test (the Heat Rise test), "but kept numerous other tests concealed" which showed temperatures well in excess of 200 degrees at highway speeds. App. 15, 143.

On February 24, 2012, the district court issued a proposed order, in which the court described possible sanctionable misconduct, but also stated that the record did not indicate who was responsible for each instance of misconduct or the amount and allocation of sanctions. App. 15-16, 229. The district court then allowed Musnuff ample opportunity to respond to the matters addressed in the proposed order. Between

March and July of 2012, Goodyear, Musnuff and Hancock each filed multiple briefs, totaling 1,111 pages.[4] The district court also held a six-hour evidentiary hearing on March 22, 2012, at which both Musnuff and Hancock testified under oath. App. 16. At the conclusion of the hearing, the district court granted the Haegers' requests to conduct additional discovery to address representations made at the hearing.

On November 8, 2012, the district court issued a 66-page order, which carefully cataloged the sanctionable misconduct, which included concealing critical test data, making intentional misrepresentations to the court and the Haegers' counsel throughout all five years of the underlying litigation, and even lying to the court during the sanctions proceedings. App. 93-194.

In short, the district court found that Goodyear's sanctionable misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal," and "permeated the entirety of this case." App. 65, 179. It found based upon Goodyear's pattern and practice in G159 case that the case would have settled much earlier. App. 171. Musnuff has not challenged this finding as clearly erroneous.

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[4] ER 288-339, ER 340-56, ER 357-72, ER 395-408, ER 409-12, ER 413-96, ER 497-510, ER 511-33, ER 573-706, ER 873-1065, ER 1066-85, ER 1086-1108, ER 1200-42, ER 1247-50, ER 2163-2250, ER 2392-2513, ER 2541-95, ER 2596-2600, SER 082-127, SER 277-303, SER 304-318, SER 917-31, SER 953-73, SER 974-96, SER 997-1017, SER 1018-35.

The district court then turned to the task of crafting an appropriate sanction to compensate the Haegers for the harm caused by Goodyear's (and the others') pervasive misconduct. As the Ninth Circuit stated, "[t]he district court then conducted an exhaustive analysis of the documentation submitted by Plaintiffs," "spent considerable time reviewing *each* time entry," and "with painstaking attention to detail, made adjustments based on Goodyear's objections." App. 19 (emphasis in original). Ultimately, the district court reduced some of the fees and costs the Haegers sought, and found that the Haegers should be "reimbursed" a total of $2,741,201.16. *Id.* The district court held Hancock responsible for twenty percent of that amount, and "Musnuff and Goodyear were held jointly responsible for the remaining eighty percent of the fees and costs." *Id.*

The district court also made an alternative, smaller, "contingent award" which was intended to apply only if the full award was found on appeal not to have a sufficient causal link to the misconduct of Goodyear and its attorneys. App. 65, 70-71; ER 1272. Specifically, based on the admissions by Musnuff, Hancock and Goodyear that all but $722,406.52 of the fees and costs for which the Haegers sought reimbursement "result[ed] from Goodyear's allegedly sanctionable conduct," ER 1352; *see also* ER 1389 (Musnuff characterized the $722,406.52 amount as being "unrelated to [the] alleged harm"), the district court's alternative award reduced the sanction by $722,406.52 (or a total of $2,018,794.64). App. 71.

On appeal, the Ninth Circuit unanimously upheld the district court's findings that Goodyear (and the others) engaged in bad faith, sanctionable misconduct. App. 20, 47-48. It also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 22, 48. The dissenting judge parted ways with the majority solely on the issue of whether there was a sufficient causal link between all the fees and costs awarded and the sanctioned misconduct. App. 55-56. Relying on this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991), that "the full attorney's fees were warranted [as a sanction] due to the frequency and severity of Chambers's abuses of the judicial system," the majority held that the district court "appropriately awarded the Haegers all their attorneys' fees and costs in prosecuting the action once the Sanctionees began flouting their clear discovery obligations and engaging in frequent and severe abuses of the judicial system." App. 34-35.

REASONS FOR DENYING THE PETITION

I. CONTRARY TO MUSNUFF'S ASSERTIONS, THE NINTH CIRCUIT DID NOT ABANDON THE CAUSATION REQUIREMENT.

Musnuff asks this Court to grant his petition based on his repeated accusation that the Ninth Circuit erroneously "abandon[ed] the critical element of causation." Petition at 21; *see also id.* at 11 (accusing the Ninth Circuit of holding that there is "no need to tailor 'compensatory' sanctions to the harm caused by

the sanctionable actions"); *id.* at 15 (the Ninth Circuit "simply did away with the necessary link between wrongful conduct and resulting harm"); *id.* at 17 (the Ninth Circuit adopted "a no-causal-link rule"). But Musnuff's accusation is wrong; the Ninth Circuit expressly found that the causation element had been fully satisfied in this case, and even carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded." App. 33 (emphasis added).

Far from "abandoning" the causation requirement, the Ninth Circuit expressly concluded that "there is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation, and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses of the Sanctionees." App. 33 (emphasis added). Indeed, in addition to acknowledging the causation requirement, the Ninth Circuit also carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded when a court invokes its inherent power." App. 33 (emphasis added). Relying on this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Ninth Circuit held that the district court had appropriately awarded:

> the amount the court reasonably believed it cost the Haegers to litigate against a party and attorneys during the time when that party and those attorneys were acting in bad

> faith. Nothing more is required under *Chambers* or our case law. . . .

App. 37.

Furthermore, the Ninth Circuit concluded that the argument that something more than the causal link the district court found is needed to establish causation is "virtually identical to the causation requirement claim" this Court rejected in *Chambers*. App. 34-35 (quoting *Chambers*, 501 U.S. at 57 (rejecting the argument that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong," and upholding the district court's conclusion "that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses")). The pervasive misconduct by Musnuff, Hancock and Goodyear in this case, rendering the entirety of five years of litigation a "sham," unquestionably supports a sanction of all the attorneys' fees and costs which the Haegers were forced to incur.

Moreover, Musnuff's suggestion that the Ninth Circuit abandoned the causation requirement is contradicted by his own admission (as well as the admissions of Hancock and Goodyear) that most of the fees and costs awarded to the Haegers – all but $722,406.52 – *are* causally linked to the sanctionees' misconduct. *See* ER 1389 (Musnuff argued that only $722,406.52 of all the fees and costs the Haegers sought were "unrelated to [the Haegers'] alleged harm"); ER 1352-54 (Goodyear argued that all but $722,406.52 were "fees

resulting from Goodyear's allegedly sanctionable conduct"); ER 1369 (Hancock argued that only $722,406.52 of the fees and costs the Haegers sought were "not directly attributable to sanctioned conduct").[5]

Accordingly, contrary to Musnuff's false accusation, the Ninth Circuit gave effect to the causation requirement when it held that "the district court did all it was required to do" to compensate the Haegers for the damages "they suffered as a *result* of Sanctionees' bad faith," including post dismissal. App. 31, 179 (emphasis added). Thus, because Musnuff's petition is based on a false premise, this Court's review is not warranted and the petition should be denied.

II. CONTRARY TO MUSNUFF'S ASSERTION, THE NINTH CIRCUIT DID NOT CIRCUMVENT DISCOVERY RULE PROCEDURES.

Musnuff also asks this Court to grant his petition based on his assertion that the district court improperly relied on its inherent power to impose sanctions instead of sanctions under Fed. R. Civ. P. 37. Musnuff's argument has no merit because: (1) Rule 37 is not the exclusive means for imposing sanctions for bad faith responses to the Haegers' first discovery requests; and (2) Goodyear's bad faith responses were just one of a

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[5] These admissions resulted in the district court's alternative, contingent award which Musnuff fails to mention in his petition. This alternative award was intended to apply only if the full award was found on appeal not to have a sufficient causal link to the misconduct of Goodyear and its attorneys. App. 65, 71.

long list of the sanctionees' misconduct for which sanctions were imposed, many of which simply are not covered by Rule 37.

The fundamental premise of Musnuff's Rule 37 argument is that, once Goodyear asserted "timely" objections to the Haegers' first discovery requests, "the only basis" for imposing sanctions on Goodyear or its attorneys was Rule 37, which requires that the Haegers first file a motion to compel and the district court enter an order which Goodyear then violates. That is plainly wrong. For example, under Rule 26(g), when an objection to a discovery request is "interposed for any improper purpose," a motion to compel, court order and violation of the order are not prerequisites to the imposition of sanctions. To the contrary, "the court, on motion or on its own, must impose an appropriate sanction on the signer [of the response], the party on whose behalf the signer was acting, or both." Rule 26(g)(3).[6]

Similarly, decisions by this Court and the various circuits confirm that Rule 37 is not the exclusive

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[6] Rule 26(g) was added in 1983 precisely because the then-existing discovery rules – including Rule 37 – could not adequately address violations of the "spirit of the rules." Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment (recognizing that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by . . . evasive responses," Rule 26(g) "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37").

means to impose sanctions for bad-faith discovery responses. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules."); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135-36 (2d Cir. 1998) (rejecting argument that sanctions for late production of documents could be based only on Rule 37 and not inherent power); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544-55 (11th Cir. 1993) (sustaining sanctions against defendants and their attorneys under 28 U.S.C. § 1927 and Rule 26(g), in part, because "[t]hroughout discovery, the defendants, through their counsel, unreasonably objected to the plaintiff's requests for information and provided incomplete answers as part of their campaign to obfuscate the truth").

Moreover, because merely negligent conduct in responding to discovery requests is enough to impose sanctions under Rule 37, it makes sense to require that a party first be given notice that his responses are inadequate before imposing sanctions. But Rule 37's procedure makes no sense in the context of sanction tools, such as inherent power, that require the substantially higher standard of bad-faith conduct. For example, a party who acts in bad faith by knowingly asserting baseless objections to discovery requests for the improper purpose of concealing critical evidence has no right to be insulated from sanctions unless the other side first files a motion to compel, the court issues an

order compelling disclosure and the answering party violates that order. Such a party already knows full well that its bad-faith conduct is improper and sanctionable. Requiring Rule 37's procedures in the context of inherent power sanctions is unnecessary, would only serve to shield bad-faith conduct, and is not legally required.

But even if it could be argued that sanctions for the bad-faith responses to the Haegers' first discovery requests must follow Rule 37's procedures, Musnuff's argument improperly ignores the fact that those responses were just the beginning of a long list of bad-faith conduct on which the district court based the sanctions decision, most of which could not be addressed by Rule 37. The district court expressly found (and the Ninth Circuit unanimously upheld those findings) that the egregious misconduct which forms the basis for the district court sanction includes: (1) as part of their "general strategy to obstruct and delay discovery," the sanctionees falsely asserted that the Haegers "did not state the legal theory of their case until January 7, 2007" (App. 97, n.5); (2) the sanctionees falsely asserted that the Haegers' counsel agreed to withdraw the first discovery request (App. 103-04); (3) the sanctionees failed to search timely for requested documents (App. 104); (4) the sanctionees concealed tests responsive to the Haegers' third discovery request (App. 154, 185); (5) the sanctionees asserted false, deceptive and after-the-fact explanations and excuses in an attempt to evade responsibility for discovery violations (App. 106-07 n.7, 134-37, 154-55, 180); (6) the sanctionees

lied about the existence and availability of test data (App. 124-25); (7) the sanctionees delayed in producing requested materials for improper tactical reasons (App. 113-14, 184); (8) the sanctionees provided (and failed to correct) false deposition testimony (App. 186-87); (9) the sanctionees made (and failed to correct) false in-court statements (App. 187-90); and (10) the sanctionees made false and deceptive statements during the evidentiary hearing and other sanction proceedings (App. 158-68). Thus, Musnuff's assertion that sanctions were imposed in this case "based on Goodyear's alleged failure to respond to a single discovery request" (Petition at 3) is not even close to the truth.

Most of the misconduct for which Musnuff and the other sanctionees were sanctioned in this case falls outside the scope of Rule 37. This is particularly true because the sanctionees' egregious misconduct did not come to light until *after* the litigation had been settled and the case closed. App. 8. This Court has recognized that a court's reliance on its inherent power in these circumstances is uniquely appropriate. *Chambers*, 501 U.S. at 50 ("But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power."). Indeed, "requiring a court to first apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." *Id.* at 50-51.

As the Ninth Circuit unanimously held, the district court's reliance on its inherent power to sanction Musnuff was proper. Thus, this Court's review is not warranted and the petition should be denied.

CONCLUSION

Musnuff has not established any compelling reason for this Court to grant the Petition. Therefore, the Haegers respectfully request that the Petition be denied.

Respectfully submitted,

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INTRODUCTION

A divided Ninth Circuit panel held that a district court may treat judge-imposed sanctions as "compensatory" – and thus deny the sanctioned party significant procedural protections applicable to punitive sanctions – even though the sanctions are not tailored to the harm suffered by the complaining party. Rather than defend this erroneous holding on the merits, respondents try to rewrite it, arguing that the Ninth Circuit ultimately concluded that the sanction imposed on petitioner *was* tailored to the harm that respondents suffered. But the record flatly contradicts that view. To start with, the district court openly admitted that it would not and could not tailor the sanction to the harm caused by the sanctioned conduct, declaring instead that it had no obligation to do so because the conduct was "truly egregious" and petitioner "must now pay the price." App. 172, 177. To make its position even clearer, the district court fashioned an alternative (and considerably less onerous) sanction as a contingency "in the event a direct linkage between the misconduct and the harm is required." App. 65.

For its part, the Ninth Circuit then affirmed the larger sanction without modification, stating that, under this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), federal courts are free to impose sanctions without tailoring the sanction to resulting harm – and without full procedural safeguards – if the sanction is based upon "the frequency and severity of . . . abuses of the judicial system and the resulting need to ensure that such abuses were not repeated." App.

34-35 (quoting *Chambers*, 501 U.S. at 57). As a result, petitioner was subjected to an enormous sanction that was punitive in every way but name, while being denied the procedural rights that the Constitution explicitly provides to persons faced with criminal punishment. That distortion of the proper line between civil and criminal sanctions merits review by this Court.

The Ninth Circuit erred a second time in holding that federal courts can use their inherent power to circumvent vital notice requirements contained in the federal rules. Respondents endorse this expansion of judicial power, arguing that the federal rules are "not the exclusive means for imposing sanctions for bad faith responses to [discovery requests]." Brief in Opp. at 13. But that argument is aimed at a straw man. As the petition makes clear, petitioner does not claim that federal courts must act according to the federal rules or not at all: the point is simply that, when imposing sanctions pursuant to their inherent power, federal courts may not abandon principles of fair notice that are fundamental to the proper treatment of litigants. No attorney litigating in federal court would reasonably expect to be sanctioned for withholding discovery material that he had not been ordered to produce, *see* Fed. R. Civ. P. 37(b)(2), and federal courts should not have the power, inherent or not, to dispense with that essential precondition. That unilateral expansion of judicial authority likewise warrants this Court's review.

I. Respondents Incorrectly Assert That the Courts Below Imposed Sanctions Consistent with the Rule That Compensatory Sanctions Must Be Tailored to the Harm Suffered, a Rule Respondents Do Not Contest.

The first question presented in this case is whether a federal court may treat a sanction as "compensatory" – and thus deny the sanctioned party the added procedural protections applicable to punitive sanctions – even though the sanction is not tailored to harm suffered by the opposing party. The correct answer is, and should be, no. *See, e.g.*, *Lightspeed Media Corp. v. Smith*, ___ F.3d ___, No. 15-2440, 2016 WL 3905605, at *6 (7th Cir. July 19, 2016) (holding that sanction for contempt was punitive rather than compensatory because the sanction "was an unconditional fine that did not reflect actual costs caused by the attorney's conduct"). Untailored sanctions are not "compensatory" in any true sense of the term, *see* Petition at 15, and federal courts should not be able to deprive litigants and their attorneys of full due process just by declaring that they are.

This rule does not threaten the availability of sanctions in response to bad faith conduct. A federal court may impose untailored sanctions if it accords the accused party or attorney the protections accorded to criminal defendants, or it may impose "compensatory" sanctions – properly tailored to the harm caused – without extending those protections. What it cannot do is what the district court did here: impose punitive

sanctions without allowing the sanctioned person the benefit of full criminal safeguards.

Respondents do not take issue with this point. Instead, they seek to recast the decisions below, claiming that both the district court and the Ninth Circuit found that the sanction here *was* tailored to harm suffered by respondents. Brief in Opp. at 10-12. That is simply not so. Relying on a misreading of *Chambers*, both of the courts below concluded that federal courts could disregard the tailoring requirement "when the sanctionable conduct rises to a truly egregious level," App. 176 (district court), or when the court purports to base its sanction on the "frequency and severity of [the party]'s abuses of the judicial system." App. 34 (Ninth Circuit), quoting *Chambers*, 501 U.S. at 57.[1] Obviously, neither court would have felt compelled to craft a non-tailoring exception for extraordinary behavior if the sanctions were tailored to the harm caused.

The district court, in fact, made clear that it was not tailoring – indeed, could not tailor – its sanction to specific harm suffered by respondents. After acknowledging that "compensatory" sanctions "*usually* must be premised" on a "direct causal link between the

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[1] The courts below created this exception for "truly egregious" conduct to avoid openly clashing with the Ninth Circuit's earlier ruling that substantial non-compensatory monetary sanctions "are akin to criminal contempt and" require courts to follow "procedures applicable to criminal cases." *Miller v. City of Los Angeles*, 661 F.3d 1024, 1030 (9th Cir. 2011). App. 177-78 (district court describing exception as "attempt" to "reconcile *Chambers* with the Ninth Circuit's recent *Miller* decision"); App. 35 (Ninth Circuit holding that its interpretation of *Chambers* "clearly trumps *Miller*").

sanctionable conduct and the alleged harm," App. 177, the district court explained that "it would be impossible to draw the precise causal connections between the misconduct and the fees Plaintiffs incurred," App. 170, and it would be "impossible to point to precise causal links," App. 191. Having reached that conclusion, rather than pursue a significantly narrower range of tailored compensatory sanctions or seek broader punitive sanctions (and provide the petitioner with the attendant procedural protections), the court relied on its misinterpretation of *Chambers* to fashion an exception to the tailoring requirement for "truly egregious" conduct. App. 177.

Furthermore, when calculating the sanction amount, the district court was again unambiguous that the sanctions award it imposed lacked the "causal links between" the sanctionable conduct and plaintiffs' harm. App. 191. To account for the chance that "a direct linkage between the misconduct and harm is required," the district court made an effort at tailoring and calculated a significantly reduced "contingent award" by subtracting fees and costs "for harm not directly linked to the misconduct." App. 65, 71. The district court did not apply the reduction, however, concluding that the sanction should "shift all the fees and costs incurred" in the years after Goodyear's served supplemental discovery responses. App. 84.

The Ninth Circuit then affirmed the untailored sanction in its entirety. In doing so, it expressly rejected petitioner's argument that the district court was required to limit the sanction to the harm suffered by

respondents. Although the required level of procedural protections (i.e., whether the sanction was "punitive" or "compensatory") was not at issue in *Chambers*, the Ninth Circuit clung to its view that in *Chambers* this court authorized sanctions without regard to the harm caused based on a court's inherent power to deter the "frequency and severity of . . . abuses of the judicial system." App. 35-36 (quoting *Chambers*, 501 U.S. at 57).

Respondents turn a blind eye to this history, asserting that the Ninth Circuit expressly found that the causation element had been satisfied in this case when the court "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded." Brief in Opp. at 11 (quoting App. 33) (emphasis added by respondents). But this argument only highlights the problems with the Ninth Circuit's decision. To treat a sanction as "compensatory" – with the loss of procedural protections that such a designation entails – it is not enough for a federal court to find that the sanctioned conduct caused *some* harm to a party: virtually any conduct deserving of sanctions will do that, including (and perhaps especially) conduct that is subject to punitive sanctions. What distinguishes compensatory sanctions from punitive sanctions is the fact that truly compensatory sanctions are specifically tailored to, *and limited by*, the harm that the conduct caused. The Ninth Circuit could not possibly have "found that the causation element had been satisfied" on that basis because the district court explicitly said that the sanction it imposed was *not* so

limited. App. 170 (finding that the court could not "separate the fees incurred due to legitimate activity from [those] incurred due to" sanctionable conduct).

Nor did the Ninth Circuit properly identify a "link . . . between the harm caused and the compensatory sanctions awarded." App. 33. Indeed, in attempting to draw such a link themselves, respondents effectively refute their own argument. As they point out (at 12-13), the district court did not stop at setting a single amount for the sanction against petitioner. To the contrary, having imposed one sanction, the court went on to calculate a second (conditional) amount in case it was determined on appeal that compensatory sanctions must be limited to the amount of harm that was actually caused. App. 65. Given that dual approach, it is illogical for respondents to claim that the first, undiminished, sanction was itself tailored to the harm suffered by respondents. Were that the case, there would have been no reason to establish a lesser figure to accommodate that more demanding (and correct) standard. And it was the greater of the two sanctions that the Ninth Circuit subsequently affirmed.

To color their presentation, respondents devote significant space to petitioner's "egregious misconduct," relying on a series of findings made by the district judge. Brief in Opp. at 6, 16-17. At no point, however, do respondents acknowledge that the cited findings were 1) the outcome of a hearing *without* the protections afforded by an independent prosecutor, trial by jury, or application of the beyond-a-reasonable-doubt standard, and 2) were made by a judge who had

herself initiated the effort to impose a sanction on petitioner. (Respondents had sought sanctions only against petitioner's client.) Furthermore, it is noteworthy that respondents' recitation places far more weight on the blameworthiness of the conduct in question than on the extent of harm supposedly caused by the conduct. If anything, that emphasis tends to confirm that the objective of the sanction was to punish petitioner – to make petitioner "pay the price," App. 172 – not to compensate respondents.

Finally, respondents rely on a purported concession by petitioner "that most of the fees and costs awarded to [respondents] – all but $722,406.52 – *are* causally linked to the sanctionees' misconduct." Brief in Opp. at 12. But, to state the obvious, the fact that part of a sanction might be compensatory does not mean that the court can use the legitimate portion of the sanction as a launching pad to impose *additional* (and thus, by definition, punitive) sanctions without complying with constitutionally required procedures. Indeed, respondents' in-for-a-penny-in-for-a-pound theory would provide a blueprint for federal judges to impose substantial punishments in the absence of full protections just by providing some actual redress as well. And, if respondents mean to suggest that the Court need not bother with the excessive sanction here because it cost petitioner – an individual attorney – only $722,406.52, they are taking the concept of *de minimis* injury to a previously uncharted level.

In short, by allowing the district court to impose a criminal sanction in the guise of a civil one, the Ninth

Circuit wrongly denied petitioner the procedural protections to which he was entitled. Respondents do not even attempt to defend that decision on the merits, and this Court should grant certiorari to review it.

II. Respondents' Defense of the Ninth Circuit's Use of Inherent Authority Confirms That the Decision Leaves Courts Unconstrained by the Discovery Rules.

The Ninth Circuit made matters even worse by approving the district court's use of its inherent power to impose a sanction on petitioner. Respondents seemingly concede that, under Rule 37 of the Federal Rules of Civil Procedure, a federal court cannot impose a sanction on an attorney for failure to produce discovery materials unless the court first enters an order compelling their production.[2] However, respondents go on to say that the limitations of Rule 37 are beside the point because the federal rules are "not the exclusive means for imposing sanctions for bad faith responses to [discovery requests]." Brief in Opp. at 13. Thus, in their view, federal courts are free to exercise their

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[2] Although Rule 37(c) permits sanctions for a failure to "supplement" discovery responses under Rule 26(e), Rule 37(c) "does not permit sanctions against the party's attorney" like Rule 37(b)(2)(C) does. *Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 141 (3d Cir. 2009). "Except where Rule 37(c) applies, Rule 37(b) usually has no application if there has not been a court order." 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2289 (3d ed.).

inherent power without regard for the requirements of notice embodied in the federal rules.

This argument, however, goes too far. It is true, as *Chambers* establishes, that federal courts have inherent power to manage proceedings before them and that they may exercise that power without strict adherence to the letter of the federal rules. 501 U.S. at 50-51. But it is not true that federal courts may invoke their inherent power without taking account of procedures that protect litigants and their attorneys against judicial unfairness and surprise. Otherwise, the federal rules would amount to little more than a set of mere guidelines that courts could ignore. At the very least, a federal court must assure that resort to its inherent power does not amount to an after-the-fact reordering of the ground rules under which the parties had previously been operating. *See Chambers*, 501 U.S. at 50 (when "bad-faith conduct . . . could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power").

That basic principle applies with full force here. As set forth in the petition, Rule 37 not only requires that a district court issue an order before a sanction can be imposed on a party's attorney for nonproduction of documents, it does so for a particular, and important, reason, i.e., to give the litigant or its attorney formal notice that the court has rejected its objection to producing previously requested documents or other material. Petition at 22-23.

Respondents argue (at 14) that prior notice is not always a precondition for sanctions, asserting that a

federal court can impose sanctions without notice under Rule 26(g). But hypotheticals under Rule 26(g) miss the point: whether under Rule 26(g) or Rule 37, "[t]he sanctioning process must comport with due process requirements." Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment. And when it comes to a "fail[ure] to produce documents . . . as requested under Rule 34," Rule 37(a)(3)(B)(iv) and (b)(2)(C) set out the process that is due before a court may order "the attorney . . . to pay the reasonable expenses, including attorney's fees, caused by the failure." Fed. R. Civ. P. 37(b)(2)(C); *see* Petition at 22.

Respondents' other main argument (at 16-17) is that much of petitioner's conduct was beyond the scope of Rule 37. This is a dubious assertion given that the district court's description of "sanctionable behavior" revolves around the nonproduction of certain test data and statements made regarding the existence and availability of that same test data. App. 179-90. Even if respondents' characterization were correct, however, it would not advance their cause. As this Court admonished in *Chambers*, "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion." 501 U.S. at 44. *See also Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764 (1980) (warning that "[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion"). This Court's cautionary instructions are particularly apt with respect to discovery disputes, where the parties and their attorneys work within an extensive – and, to the attorneys, highly

familiar – set of procedural rules, which allow for objections and counter-objections. If the rules do not address specific behavior, as respondents contend here, a federal court should not simply invent its own rules to cover what was not covered, thereby tilting the balance in favor of one party against another. Indeed, it is especially inappropriate for a court to do so when, as here, the party subject to possible sanctions can no longer alter his behavior and comply. Changing the rules after the game is over is the paradigm of unfair treatment.

The Ninth Circuit failed to apply these principles to curb the district court's abuse of its inherent power. That issue independently warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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